ASPEN FINANCIAL SERVICES, INC., A NEVADA CORPORATION; ASPEN FINANCIAL SERVICES, LLC, A NEVADA LIMITED LIABILITY COMPANY; ASPEN BAY FINANCIAL, LLC, A NEVADA LIMITED LIABILITY COMPANY; AND JEFFREY B. GUINN, AN INDIVIDUAL, PETITIONERS, *v.* THE EIGHTH JUDICIAL DISTRICT COURT OF THE STATE OF NEVADA, IN AND FOR THE COUNTY OF CLARK; AND THE HONORABLE MARK R. DENTON, DISTRICT JUDGE, RESPONDENTS, AND KENNETH GRAGSON AND YVONNE GRAGSON, TRUSTEES OF THE KENNETH GRAGSON AND YVONNE GRAGSON FAMILY TRUST; NORTH MAIN, LLC, A NEVADA LIMITED LIABILITY COMPANY; BONNIE H. GRAGSON AND KENNETH RAY GRAGSON, TRUSTEES OF THE GRAGSON 1988 TRUST; RODNEY F. REBER, AS GENERAL PARTNER OF THE RODNEY F. REBER FAMILY LIMITED PARTNERSHIP; LINDA REBER, INDIVIDUALLY; LOIS LEVY, TRUSTEE OF THE LOIS LEVY FAMILY TRUST, DTD 2/11/93; CHARLES E. THOMPSON, TRUSTEE OF THE CHARLES E. THOMPSON 1989 TRUST; CONNIE LAVERNE THOMPSON, INDIVIDUALLY AND AS TRUSTEE OF THE CONNIE LAVERNE THOMPSON FAMILY TRUST, DTD 12/12/05; DAWN J. GERKE, TRUSTEE OF THE BLAKELY CHARITABLE REMAINDER TRUST, DTD 5/2/97; JAMES B. GERKE AND DAWN J. GERKE, TRUSTEES OF THE BYRON TRUST, DTD 5/2/85; DAVID J. WILLDEN, TRUSTEE OF THE DAVID J. WILLDEN CHARITABLE REMAINDER UNI TRUST DATED 12/23/87; CHERYL ROGERS-BARNETT AND LARRY BARNETT, TRUSTEES OF THE ROGERS-BARNETT FAMILY TRUST, DTD 11/28/03; DAVID A. SMITH, AN INDIVIDUAL; KIRSTI D. RICE, TRUSTEE OF THE RICE GRANDCHILDREN EDUCATION TRUST; RUSSELL DAVIES, AN INDIVIDUAL; JOY DAVIES, AN INDIVIDUAL; AND CHARLES BEARUP AND BERNARDINE BEARUP, REAL PARTIES IN INTEREST.

No. 58184

December 6, 2012 289 P.3d 201

Original petition for a writ of mandamus or prohibition challenging a district court order denying petitioners' motion to stay certain testimonial discovery.

Investors brought action against real estate loan servicers seeking to recover losses they allegedly incurred as a result of loan servicers' fraud. After the district court denied loan servicers' request to stay discovery in order to accommodate loan servicers' Fifth Amendment privilege in parallel criminal investigation of their allegedly fraudulent activity, loan servicers petitioned for writ of

mandamus or prohibition. The supreme court, SAITTA, J., held that denial of stay was not abuse of discretion.

Petition denied.

Bailey Kennedy and *John R. Bailey, Joseph A. Liebman*, and *Brandon P. Kemble*, Las Vegas, for Petitioners.

Woods Erickson Whitaker & Maurice LLP and *Aaron R. Maurice* and *Justin S. Hepworth*, Henderson, for Real Parties in Interest.

Murchison & Cumming, LLP, and *Michael J. Nunez* and *Maria D. Toto*, Las Vegas, for Amici Curiae Stephen Quinn and Victoria Quinn.

Pico Rosenberger and *James R. Rosenberger*, Las Vegas, for Amicus Curiae Today's Realty, Inc.

Prince & Keating and *Dennis M. Prince* and *Douglas J. Duesman*, Las Vegas, for Amici Curiae Donna Ruthe, et al.

1. MANDAMUS.
   Because mandamus or prohibition writ relief is an extraordinary remedy, the decision to entertain a writ petition lies within the supreme court's discretion.
2. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion. NRS 34.160.
3. PROHIBITION.
   A writ of prohibition serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction. NRS 34.320.
4. PROHIBITION.
   Although a writ of prohibition is an appropriate remedy for the prevention of improper discovery, extraordinary writs are generally not available to review discovery orders.
5. MANDAMUS; PROHIBITION.
   In some narrow instances, mandamus or prohibition writ relief may be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and thereby render a later appeal ineffective.
6. ACTION.
   Denial of motion by real estate loan servicers to stay discovery in civil fraud action against them by investors who allegedly suffered substantial losses as a result of loan servicers' activities in order to accommodate loan servicers' Fifth Amendment rights pending a parallel criminal investigation of those activities was not an abuse of discretion, where no indictment had yet been issued in criminal investigation and investors would be prejudiced by indeterminate delay in complex fraud case. U.S. CONST. amend. 5.

7. WITNESSES.
   Determining how to proceed in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is a matter within the discretion of the district court. U.S. CONST. amend. 5.
8. APPEAL AND ERROR.
   Denial of a motion to stay civil proceedings made in connection with litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is reviewed for an abuse of discretion. U.S. CONST. amend. 5.
9. WITNESSES.
   A corporation does not possess a Fifth Amendment right against self-incrimination. U.S. CONST. amend. 5.
10. WITNESSES.
    Fifth Amendment privilege against self-incrimination may be invoked in both criminal and civil proceedings. U.S. CONST. amend. 5.
11. ACTION.
    Determining whether to grant a stay of civil litigation in order to accommodate a civil litigant's Fifth Amendment rights in parallel criminal proceedings, the court should analyze the extent to which the litigant's Fifth Amendment rights are implicated, as well as the following nonexhaustive factors: (1) the interest of the plaintiffs in proceeding expeditiously with the litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden that any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the management of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation. U.S. CONST. amend. 5.
12. ACTION.
    The extent to which a party's Fifth Amendment privilege against self-incrimination in a criminal matter is implicated in parallel civil matter, as factor to be considered in determining whether stay of discovery in civil matter is appropriate to accommodate privilege, is generally determined by reference to the overlap between the civil and criminal cases and the status of the criminal matter. U.S. CONST. amend. 5.
13. ACTION.
    A stay is most appropriate to accommodate a party's Fifth Amendment privilege against self-incrimination where the subject matter of a parallel civil and criminal proceeding or investigation involving that party is the same. U.S. CONST. amend. 5.
14. ACTION.
    In determining whether a stay of a civil proceeding is appropriate to accommodate a party's Fifth Amendment privilege against self-incrimination in a parallel criminal proceeding, the need for a stay is far weaker when no indictment has been returned, and as a general rule, preindictment requests for a stay are denied because there is less risk of self-incrimination and more uncertainty about the effect of a delay on the civil case. U.S. CONST. amend. 5.
15. ACTION.
    A court has discretion to stay a civil litigation in order to accommodate a litigant's Fifth Amendment privilege against self-incrimination, even in favor of a pending criminal investigation that has not ripened into an indictment. U.S. CONST. amend. 5.

16. ACTION.
    The touchstone for evaluating a preindictment motion to stay a civil proceeding to accommodate a litigant's Fifth Amendment privilege against self-incrimination in a parallel criminal proceeding is considering whether special circumstances justify granting a stay despite the absence of an indictment. U.S. CONST. amend. 5.
17. WITNESSES.
    Adverse inference in civil action based on party's invocation of Fifth Amendment privilege against self-incrimination may be drawn only when independent evidence exists of the fact to which the party refuses to answer. U.S. CONST. amend. 5.

Before the Court EN BANC.

OPINION

By the Court, SAITTA, J.:

Parties facing a civil proceeding and a simultaneous criminal investigation often confront unpleasant choices. They may, for instance, be put to the choice of providing testimony in the civil proceeding that might be used by criminal investigators, or asserting their Fifth Amendment privilege against self-incrimination to the detriment of their defense of the civil suit. Yet while such a situation may require a party to make difficult decisions, and although the district court has the power to stay the civil proceeding in the interest of fairness, it is constitutionally permissible for both matters to proceed concurrently. Ultimately, the district court's determination regarding whether a stay is warranted is a discretionary decision that comes at the end of a careful balancing of the interests involved. Here, after evaluating the factors relevant to this determination, we conclude that the district court did not abuse its discretion in denying petitioners' motion to stay.

FACTS

Petitioners Aspen Financial Services, Inc.; Aspen Financial Services, LLC; Aspen Bay Financial, LLC; and Jeffrey B. Guinn (collectively, when possible, ''the Aspen defendants'') are corporate entities and an individual that service and broker loans for the acquisition and development of real property in Southern Nevada. In 2005 and 2006, dozens of investors, including real parties in interest Kenneth and Yvonne Gragson, et al. (collectively, ''the Gragson plaintiffs''), provided millions of dollars to the Aspen defendants to finance loans for the development of certain real property located in Las Vegas known as the Milano property. In 2008, one of these loans went into default, and the Gragson plaintiffs and other investors suffered substantial losses. Although the Aspen defendants attributed these losses to the general decline in the Las Vegas real estate market, the Gragson plaintiffs believed that the

Aspen defendants had defrauded them by operating, in essence, a real estate Ponzi scheme. The Gragson plaintiffs therefore brought suit against the Aspen defendants in district court.

After nearly all other discovery had been completed, the Gragson plaintiffs noticed the depositions of Sean Corrigan, the president of one of the corporate Aspen defendants, and Jeffrey Guinn, one of the individual Aspen defendants. Shortly before these depositions were to be taken, the Aspen defendants filed a motion with the district court to stay any depositions and written discovery that would require their employees and officers or Guinn to make testimonial statements. The Aspen defendants asserted that the Federal Bureau of Investigation (F.B.I.) had initiated a criminal investigation into their activities at the behest of the Gragson plaintiffs. They further asserted that they had been served with a federal grand jury subpoena seeking information about various subjects, including the loans for the Milano property. In addition, the Aspen defendants argued that the Gragson plaintiffs had been, and would continue, funneling discovery obtained in the civil proceeding to the F.B.I. After an extensive hearing, the district court issued a written order summarily denying the motion without prejudice. The Aspen defendants now petition this court for a writ of mandamus or prohibition directing the district court to grant their motion to stay.

DISCUSSION

[Headnotes 1-5]

Because writ relief is an extraordinary remedy, ''the decision to entertain a writ petition lies within our discretion.'' *Haley v. Dist. Ct.*, 128 Nev. 171, 175, 273 P.3d 855, 858 (2012). ''A writ of mandamus is available to compel the performance of an act that the law requires as a duty resulting from an office, trust, or station or to control an arbitrary or capricious exercise of discretion.'' *International Game Tech. v. Dist. Ct.*, 124 Nev. 193, 197, 179 P.3d 556, 558 (2008) (citations omitted); NRS 34.160. A writ of prohibition, in turn, ''serves to stop a district court from carrying on its judicial functions when it is acting outside its jurisdiction.'' *Sonia F. v. Dist. Ct.*, 125 Nev. 495, 498, 215 P.3d 705, 707 (2009); NRS 34.320. Neither form of relief is available when an adequate and speedy legal remedy exists. NRS 34.170; NRS 34.330. And, although ''a writ of prohibition is a more appropriate remedy for the prevention of improper discovery,'' *Valley Health System v. Dist. Ct.*, 127 Nev. 167, 171 n.5, 252 P.3d 676, 678 n.5 (2011), we have explained that ''writs are generally not available to review discovery orders.'' *Id.* at 171, 252 P.3d at 678. In some narrow instances, however, writ relief may be available when it is necessary to prevent discovery that would cause privileged information to irretrievably lose its confidential nature and

thereby render a later appeal ineffective. *Id.* at 171-72, 252 P.3d at 678-79; *Wardleigh v. District Court*, 111 Nev. 345, 350-51, 891 P.2d 1180, 1183-84 (1995).

Here, if discovery is not stayed, Guinn, in particular, will face a difficult choice when the Gragson plaintiffs depose him. He can either waive his Fifth Amendment privilege and risk revealing incriminating information to criminal investigators, *see Volmar Distributors v. New York Post Co.*, 152 F.R.D. 36, 39-40 (S.D.N.Y. 1993), or he can assert his privilege and forego the opportunity to deny the allegations against him under oath, thereby ''effectively forfeiting the civil suit.'' *See id.* at 39. Thus, there may not be an adequate remedy here, apart from writ relief, if, as the Aspen defendants claim, the district court improperly denied their motion to stay. *See Valley Health*, 127 Nev. at 172, 252 P.3d at 679 (writ relief may be available to prevent the discovery of allegedly privileged materials ''because once such information is disclosed, it is irretrievable''); *Meyer v. District Court*, 95 Nev. 176, 177, 591 P.2d 259, 260 (1979) (considering a petition for a writ of prohibition seeking to bar the enforcement of a district court order that precluded a party from testifying at a custody hearing unless the party waived her Fifth Amendment privilege and answered certain discovery questions); *see also Brunzell Constr. v. Harrah's Club*, 81 Nev. 414, 419, 404 P.2d 902, 905 (1965) (holding that an order granting or denying a stay of proceedings is not appealable), *superseded by statute as stated in Casino Operations, Inc. v. Graham*, 86 Nev. 764, 765, 476 P.2d 953, 954 (1970). Accordingly, we exercise our authority to entertain this writ petition.

The district court did not abuse its discretion in denying the Aspen defendants' motion to stay

[Headnotes 6-8]

''Determining how to proceed in response to a civil litigant's request for accommodation of his or her Fifth Amendment privilege against self-incrimination is a matter within the discretion of the district court.'' *Francis v. Wynn Las Vegas*, 127 Nev. 657, 664, 262 P.3d 705, 710 (2011). Therefore, the denial of a motion to stay civil proceedings made in connection with such a request is reviewed for an abuse of discretion. *Federal Sav. and Loan Ins. Corp. v. Molinaro*, 889 F.2d 899, 902 (9th Cir. 1989).

[Headnote 9]

At the outset, we note that the corporate Aspen defendants enjoy no Fifth Amendment privilege against self-incrimination. *See Afro-Lecon, Inc. v. U.S.*, 820 F.2d 1198, 1206 (Fed. Cir. 1987) (''It is well settled that a corporation does not possess a fifth amendment right against self-incrimination.''). They nonetheless argue that a stay should be extended to them because they would

not otherwise be able to defend themselves if their employees, officers, and Guinn are forced to assert their privilege against self-incrimination. While stays are occasionally extended to encompass corporate defendants under some circumstances, *see, e.g.*, *Volmar*, 152 F.R.D. at 42, the corporate Aspen defendants' argument presupposes that a stay was necessary as to their employees, officers, and Guinn. For the reasons explained below, we believe that the district court acted well within its discretion in determining that such a stay was unnecessary.

[Headnote 10]

As we have recognized, ''[t]he Fifth Amendment privilege against self-incrimination may be invoked in both criminal and civil proceedings.'' *Francis*, 127 Nev. at 664, 262 P.3d at 711. A predicament arises, however, when a litigant invokes his or her privilege due to parallel civil and criminal matters:

> When parallel civil and criminal actions arising from the same transactions or issues have been instituted, a court is faced with a dilemma. On the one hand, a parallel civil proceeding can vitiate the protections afforded the accused in the criminal proceeding if the prosecutor can use information obtained from him through civil discovery or testimony elicited in the civil litigation. This also may cause him to confront the prospect of divulging information which may incriminate him. On the other hand, the pendency of a parallel criminal proceeding can impede the search for truth in the civil proceeding if the accused resists disclosure and asserts his privilege against self-incrimination and thereby conceals important evidence.

Milton Pollack, Sr. J., U.S. Dist. Ct., S.D.N.Y., Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 202 (Oct. 17-19, 1989).

To resolve this dilemma, we have instructed the courts of this state to, upon timely motion, balance the divergent interests implicated when a civil litigant invokes the Fifth Amendment. *Francis*, 127 Nev. at 665, 262 P.3d at 711. One of the tools that trial courts have at their disposal to strike this balance is to stay the civil proceeding until the criminal matter is concluded. *Id.* Recently, in *Francis*, we noted that an accommodation of a party's Fifth Amendment privilege may be particularly appropriate ''where the defendant faces parallel civil and criminal proceedings brought by different governmental entities arising from the same set of facts.'' *Id.* But because the litigant claiming Fifth Amendment protection in *Francis* never moved the district court for the particular accommodation of a stay of the civil proceeding, *id.* at 665-66, 262 P.3d at 712, our analysis focused on the factors that bear on whether other remedial measures should have been taken. *Id.* at 666, 262 P.3d at 711-12. Here, in contrast, the Aspen defendants sought the

specific accommodation of a stay of the civil proceedings. Because this specific accommodation has not been addressed by this court, we are essentially working from a blank slate with respect to the pivotal question presented in this petition. As such, we look to other jurisdictions for guidance.

Courts in other jurisdictions have explained that although the district court has the power to stay a civil proceeding due to a pending criminal investigation, ''a defendant has no constitutional right to a stay simply because a parallel criminal proceeding is in the works.'' *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 77-78 (1st Cir. 2004); *see also Louis Vuitton Malletier S.A. v. LY USA, Inc.*, 676 F.3d 83, 98 (2d Cir. 2012) (observing that while the district court may stay a civil proceeding due to a related criminal matter, ''the Constitution rarely, if ever, *requires* such a stay''); *Molinaro*, 889 F.2d at 902 (''While a district court may stay civil proceedings pending the outcome of parallel criminal proceedings, such action is not required by the Constitution.''). Courts have also observed that a stay of civil discovery pending the outcome of a related criminal matter should not be granted lightly because it ''is an extraordinary remedy appropriate for extraordinary circumstances.'' *Weil v. Markowitz*, 829 F.2d 166, 174 n.17 (D.C. Cir. 1987). Thus, ''[a] movant must carry a heavy burden'' in order to demonstrate that a stay is warranted. *Microfinancial*, 385 F.3d at 77; *see Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 397-98 (S.D. Tex. 2009) (''[T]here is a strong presumption in favor of discovery, and it is the party who moves for a stay that bears the burden of overcoming this presumption.'').

[Headnote 11]

Determining whether to grant such a stay is a fact-intensive, case-by-case determination that requires a delicate balancing of the ''competing interests involved in the case.'' *Molinaro*, 889 F.2d at 902. This inquiry ''is highly nuanced,'' *Microfinancial*, 385 F.3d at 78, and has given rise to ''a complex area of jurisprudence.'' *State ex rel. Wright v. Stucky*, 517 S.E.2d 36, 41 n.7 (W. Va. 1999). Against this backdrop, the Ninth Circuit Court of Appeals has set forth a comprehensive framework for analyzing whether to grant a stay. *Keating v. Office of Thrift Supervision*, 45 F.3d 322 (9th Cir. 1995). Under this framework, courts should analyze '' 'the extent to which the defendant's fifth amendment rights are implicated,' '' *id.* at 324 (quoting *Molinaro*, 889 F.2d at 902), as well as the following nonexhaustive factors:

> (1) the interest of the plaintiffs in proceeding expeditiously with [the] litigation or any particular aspect of it, and the potential prejudice to plaintiffs of a delay; (2) the burden which any particular aspect of the proceedings may impose on defendants; (3) the convenience of the court in the manage-

> ment of its cases, and the efficient use of judicial resources; (4) the interests of persons not parties to the civil litigation; and (5) the interest of the public in the pending civil and criminal litigation.

Id. at 325.

This framework, or minor variations thereof, has been adopted by several jurisdictions. *See, e.g.*, *Alcala*, 625 F. Supp. 2d at 398-99; *S.E.C. v. Nicholas*, 569 F. Supp. 2d 1065, 1068-69, 1072 (C.D. Cal. 2008); *Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F. Supp. 2d 573, 576 (S.D.N.Y. 2001); *Avant! Corp. v. Superior Court*, 94 Cal. Rptr. 2d 505, 510-11 (Ct. App. 2000); *King v. Olympic Pipeline Co.*, 16 P.3d 45, 52-53 (Wash. Ct. App. 2000). Because this framework carefully accounts for the interests that are involved when a party brings a motion to stay in connection with a request for accommodation of their Fifth Amendment privilege, we believe that it supplies the appropriate rubric for considering such motions.[1] Having identified the salient principles that guide our resolution of this petition, we now apply them.

Implication of the Fifth Amendment privilege

[Headnotes 12, 13]

The extent to which a party's Fifth Amendment privilege against self-incrimination is implicated is generally determined by reference to the overlap between the civil and criminal cases and the status of the criminal matter. *Alcala*, 625 F. Supp. 2d at 400. The degree of overlap between the issues in the civil and criminal matters has been described as ''[t]he most important factor at the threshold'' in considering whether to grant a stay. Pollack, *supra*, at 203. The extent of overlap is relevant because ''[i]f there is no overlap, there would be no danger of self-incrimination and accordingly no need for a stay.'' *Trustees of Plumbers Pen.*

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[1]The Aspen defendants suggest that the district court erred in not considering each of these factors in its written order denying their motion to stay. Although the district court did not expressly analyze each of these factors in its written order, the transcript of the hearing on the motion demonstrates that the district court considered the relevant factors and provides a clear insight into why the court denied the motion. *See Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 895, 266 P.3d 602, 608 (2011) (oral pronouncements on the record may be used by a reviewing court to construe an order that is silent on a point); *see also Microfinancial*, 385 F.3d at 77 (concluding that the district court did not err in declining to issue written findings of fact and conclusions of law along with its denial of a motion to stay; ''a reviewing court ordinarily may assume that the judge gave careful consideration to the motion and weighed the appropriate factors''). Further, although the district court's order focused on the lack of an indictment, and although that factor alone is not dispositive, the district court's denial of a stay was not an abuse of discretion when the lack of indictment is viewed in the context of the other factors, which is addressed in the discussion that follows.

Fund v. Transworld Mech., 886 F. Supp. 1134, 1139 (S.D.N.Y. 1995). Conversely, a significant overlap increases the risk of self-incrimination and heightens the need for a stay. *Alcala*, 625 F. Supp. 2d at 400 n.8. ''Thus a stay is most appropriate where the subject matter of the parallel civil and criminal proceeding or investigation is the same.'' *King*, 16 P.3d at 55.

Here, the criminal investigation involves the loans for the Milano property, and the Aspen defendants appear to be the targets of this investigation. This is confirmed by the undisputed facts that the Gragson plaintiffs contacted the F.B.I. and that investigators specifically requested that the Gragson plaintiffs provide information regarding various aspects of these loans. Additionally, the Aspen defendants were served with a federal grand jury subpoena requesting documentation of the loans for the Milano property. In other words, there appears to be significant overlap between the subjects of the Gragson plaintiffs' lawsuit and the criminal investigation.

[Headnotes 14, 15]

Turning to the status of the criminal matter, we note that the need for a stay is ''far weaker'' when, as here, ''[n]o indictment has been returned.'' *Securities & Exchange Com'n v. Dresser Indus.*, 628 F.2d 1368, 1376 (D.C. Cir. 1980). As a general rule, preindictment requests for a stay are denied ''because there is less risk of self-incrimination, and more uncertainty about the effect of a delay on the civil case.'' *Walsh Securities v. Cristo Property Management*, 7 F. Supp. 2d 523, 527 (D.N.J. 1998); *see King*, 16 P.3d at 56 (''Where there is not yet a formal charge, resolution of the criminal matter may be so remote it should not be awaited.''). This is not to say, however, that a motion to stay that is brought before the issuance of an indictment should be denied solely on that ground. *See, e.g.*, *Chao v. Fleming*, 498 F. Supp. 2d 1034, 1038 (W.D. Mich. 2007) (''[A] stay should not be categorically denied solely because the defendant has not yet been indicted.''); *Sterling*, 175 F. Supp. 2d at 576-77 (the general rule that a stay should only be granted after the defendant seeking a stay has been indicted ''is, at best, a guide to the exercise of discretion, and not a hard-and-fast rule''); *King*, 16 P.3d at 56 (''[C]onditioning a stay upon the presence of an indictment is contrary to both law and common sense.'' (citation omitted)). Indeed, ''[t]here is no question that a court has discretion to stay a civil litigation even in favor of a pending investigation that has not ripened into an indictment.'' *Sterling*, 175 F. Supp. 2d at 577.

[Headnote 16]

The touchstone for evaluating a preindictment motion to stay is considering whether ''special circumstances'' justify granting a stay despite the absence of an indictment. One such instance is

where the issuance of a formal indictment is ''an eventuality.'' *See, e.g.*, *Chao*, 498 F. Supp. 2d at 1039 (internal quotation marks omitted). Another circumstance in which a preindictment stay may be warranted is where the government has initiated the civil proceeding and also controls the simultaneous criminal investigation. *See, e.g.*, *S.E.C. v. Healthsouth Corp.*, 261 F. Supp. 2d 1298, 1326 (N.D. Ala. 2003). In such a circumstance, ''the government itself has an opportunity to escalate the pressure on defendants by manipulating simultaneous civil and criminal proceedings'' and, as a result, ''there is a special danger that the government can effectively undermine rights that would exist in a criminal investigation by conducting a de facto criminal investigation using nominally civil means.'' *Sterling*, 175 F. Supp. 2d at 578-79.

The Aspen defendants attempt to persuade us that the same danger is present here, pointing out that the Gragson plaintiffs have been, and might attempt to continue, funneling discovery obtained in the civil proceeding to criminal investigators. They also point out that the Gragson plaintiffs reported the Aspen defendants' alleged wrongdoing to the F.B.I., which prompted it to open its investigation. Further, they allege that the interaction between the Gragson plaintiffs and the F.B.I. is in bad faith and improper. In essence, the Aspen defendants contend that the Gragson plaintiffs' lawsuit is simply a conduit for the F.B.I.'s investigation. These contentions by the Aspen defendants lack support from the record. Further, as articulated below, bad faith and impropriety do not automatically arise when a plaintiff shares with criminal investigators the information that surfaced during a civil action and the government is not a party to both the criminal and civil proceedings.

As courts in other jurisdictions have recognized, there is ''no reason why those victims who have the resources and willingness to pursue their own investigation and enforce their own rights should be precluded either from doing so or from sharing the fruits of their efforts with law enforcement agencies.'' *International Business Machines Corp. v. Brown*, 857 F. Supp. 1384, 1389 (C.D. Cal. 1994); *see King*, 16 P.3d at 58 (where ''[t]here is no indication that prosecutors seek to control—as opposed to benefit from—civil discovery,'' it is not problematic for the government to ''seek to obtain the results of civil discovery''). And, as one court aptly noted, ''it would be perverse if plaintiffs who claim to be the victims of criminal activity were to receive slower justice than other plaintiffs because the behavior they allege is sufficiently egregious to have attracted the attention of the criminal authorities.'' *Sterling*, 175 F. Supp. 2d at 575.

More importantly, the possibility that a private plaintiff may share information with the government ''is hardly the same thing'' as the situation in which the government is a party in parallel criminal and civil proceedings. *Id.* at 579. After all, it must be re-

membered that private entities and the government have differing interests. *Id.* Next, despite the Aspen defendants' invitation for us to do so, courts cannot assume that a civil plaintiff's lawsuit ''is simply a stalking horse for the government's criminal inquiry, rather than a good faith effort to obtain compensation for their own private injuries.'' *Id.*; *see Brown*, 857 F. Supp. at 1388 (''Mere allegations of prosecutorial impropriety, with no supporting evidence, are insufficient to support a stay.''). Based on the scant supporting evidence in the record before us, we cannot conclude that the Gragson plaintiffs and the government have entered into an improper arrangement.[2] Importantly, if actual evidence of such an arrangement should later surface or if the circumstances otherwise change, the Aspen defendants remain free to renew their motion to stay because the district court astutely denied their motion without prejudice. Although the degree of overlap between the civil and criminal matters demonstrates that the Aspen defendants' self-incrimination concerns are perhaps not simply fanciful, their fears are largely speculative and uncertain given the absence of (1) a criminal indictment and (2) evidence to support the contention that the F.B.I. and Gragson plaintiffs acted improperly and in bad faith such that the civil suit is a conduit for the F.B.I.'s investigation. As a result, the Aspen defendants failed to show additional circumstances to justify departing from the general rule that a stay should only be granted after a party seeking it has been indicted.

Plaintiffs' interests and potential prejudice

The Aspen defendants' concerns are further offset by the prejudice that a stay would cause to the interests of the Gragson plaintiffs. Plaintiffs to civil suits have ''an obvious interest in proceeding expeditiously,'' *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 78 (1st Cir. 2004), and ''[t]his is particularly true in the context of complex litigation which must proceed in an efficient manner.'' *Digital Equipment Corp. v. Currie Enterprises*, 142 F.R.D. 8, 12 (D. Mass. 1991). The delay resulting from a stay may also ''duly frustrate a plaintiff's ability to put on an effective case'' because as time elapses, ''witnesses become unavailable, memories of conversations and dates fade, and documents can be lost or destroyed.'' *Alcala v. Texas Webb County*, 625 F. Supp. 2d 391, 405 (S.D. Tex. 2009). In addition, because plaintiffs are often ''entitled to preserve the fact that they were deprived of in-

[2]The evidence shows that the Gragson plaintiffs reported the Aspen defendants' alleged fraud to the F.B.I. and provided the F.B.I. with documents regarding the loans for the Milano property. Further, the Gragson plaintiffs do not contest that they have, and will continue, to share with the F.B.I. information gained from discovery. This evidence merely shows that the Gragson plaintiffs are lawfully sharing with the F.B.I. information surfacing from the civil proceeding. This evidence does not demonstrate impropriety or bad faith.

formation'' due to a defendant's invocation, a stay may impede a plaintiff's ability to obtain these ''negative inferences.'' *In re CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227, 1239 (N.D. Okla. 2003).

[Headnote 17]

The delay caused by a stay would greatly prejudice the Gragson plaintiffs' ability to present an effective case in view of the complex nature of their claims. *See Brown*, 857 F. Supp. at 1391 (observing that the complexity of proving business fraud weighs heavily against staying such cases). In addition, because many of the Gragson plaintiffs are elderly, a stay could effectively prevent them from testifying. *See D'Ippolito v. American Oil Company*, 272 F. Supp. 310, 312 (S.D.N.Y. 1967) (denying a motion to stay a civil proceeding pending resolution of a parallel criminal matter where certain witnesses were ''of advanced years''). A stay would also delay or preclude the Gragson plaintiffs' ability to draw the adverse inference of the Aspen defendants' invocation—that is, that they were deprived of information by central figures in the civil proceedings.[3] Thus, the prejudice that a stay would pose to the Gragson plaintiffs is acute.

Burdens on the defendants

We have already alluded to some of the burdens on the Aspen defendants. The primary burden posed by parallel criminal and civil matters is the danger of undermining a defendant's Fifth Amendment privilege against self-incrimination. This danger has been articulated as follows:

> On the one hand, if [a defendant] invokes his constitutional privilege during civil discovery, not only does this prevent

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[3]Though the Aspen defendants detest the practice, there is no question that under certain circumstances, the district court may, without running afoul of the Fifth Amendment, instruct the jury that it is permitted to draw an adverse inference from a defendant's invocation. *See Baxter v. Palmigiano*, 425 U.S. 308, 318 (1976) (''[T]he Fifth Amendment does not forbid adverse inferences against parties to civil actions when they refuse to testify in response to probative evidence offered against them.''). We caution, however, that such an inference may be drawn only ''when independent evidence exists of the fact to which the party refuses to answer.'' *Doe ex rel. Rudy-Glanzer v. Glanzer*, 232 F.3d 1258, 1264 (9th Cir. 2000). Though not binding on this court, the court in *King v. Olympic Pipeline Co.*, 16 P.3d 45, 54 (Wash. Ct. App. 2000), provides guidance by expressing that an adverse inference arising from a defendant's invocation, and its effect on the defendant's interest, should be considered when balancing the competing interests involved in this type of case. Here, to the extent that an adverse inference may be drawn and detrimentally affect the Aspen defendants, such an effect does not change this court's conclusion that a stay is not warranted in light of the other factors that disfavor a stay.

> him from adequately defending his position, but it may subject him to an adverse inference from his refusal to testify. On the other hand, if [a defendant] fails to invoke his Fifth Amendment privilege, he waives it, and any evidence adduced in the civil case can then be used against him in the criminal trial.

Volmar Distributors v. New York Post Co., 152 F.R.D. 36, 39-40 (S.D.N.Y. 1993) (citations omitted). In addition, continuing with civil discovery in the face of a criminal investigation may burden a defendant because, by invoking the privilege to certain questions, a defendant may inadvertently ''reveal[ ] his weak points to the criminal prosecutor.'' *Afro-Lecon, Inc. v. U.S.*, 820 F.2d 1198, 1203 (Fed. Cir. 1987). Other burdens include the diversion of resources needed to defend a possible criminal action, *White v. Mapco Gas Products, Inc.*, 116 F.R.D. 498, 502 (E.D. Ark. 1987), or ''the likelihood that the materials unearthed during civil discovery may eventually inure to the benefit of the government prosecution,'' thereby effectively broadening the scope of criminal discovery.[4] *King v. Olympic Pipeline Co.*, 16 P.3d 45, 58 (Wash. Ct. App. 2000).

To be sure, these are heavy burdens. But the fact remains that there is no firm indication as to when the F.B.I.'s investigation began, what priority has been assigned to it, or whether the government has attempted to interview the Aspen defendants. As such, there is no way to intelligently predict how long the investigation may last, much less whether it will in fact culminate in a criminal prosecution. The burdens on the Aspen defendants are, therefore, essentially a matter of conjecture at this stage. *See Sterling Nat. Bank v. A-1 Hotels Intern., Inc.*, 175 F. Supp. 2d 573, 577 (S.D.N.Y. 2001) (a preindictment motion to stay ''must be balanced significantly differently'' than a post-indictment motion because although ''many of the same risks to the civil defendant are present, the dangers are at least somewhat more remote, and it is inherently unclear . . . just how much the unindicted defendant really has to fear''). Thus, while we do not take lightly the burdens that the Aspen defendants may ultimately face, at this point, there is only a faint possibility that these dangers will be manifested.

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[4]The Aspen defendants assert that the media attention on this case presents a substantial burden to their interests. This fact, however, ''may weigh either for or against a stay.'' *King*, 16 P.3d at 59. In *Keating v. Office of Thrift Supervision*, for example, the court held that an ''inordinate amount of media attention given to the case'' weighed against a stay since this attention implicated the public's confidence and interest in the resolution of the civil proceeding. 45 F.3d 322, 326 (9th Cir. 1995). Here, any media attention only heightens the public's interest in an efficient resolution to this matter, such that the media attention disfavors a stay.

Convenience and efficiency of the district court

The Aspen defendants' concerns ring especially hollow when juxtaposed with the district court's interest in convenience and efficiency. The district court's interest is, of course, ''deserving of substantial weight.'' *Microfinancial, Inc. v. Premier Holidays Intern.*, 385 F.3d 72, 79 (1st Cir. 2004). ''[C]onvenience of the courts is best served when motions to stay proceedings are discouraged.''[5] *U.S. v. Private Sanitation Industry Ass'n*, 811 F. Supp. 802, 808 (E.D.N.Y. 1992). In addition, ''a policy of freely granting stays solely because a litigant is defending simultaneous multiple suits would threaten to become a constant source of delay and an interference with judicial administration.'' *Paine, Webber, Jackson & Curtis, Inc. v. Malon S. Andrus, Inc.*, 486 F. Supp. 1118, 1119 (S.D.N.Y. 1980). Furthermore, the district court's interest in expeditiously resolving lawsuits is intensified in complex litigation. *In re CFS-Related Securities Fraud Litigation*, 256 F. Supp. 2d 1227, 1241 (N.D. Okla. 2003).

It is worth reiterating that because no indictments have been issued, a stay here would have an indefinite, and likely protracted, duration. And, although the Aspen defendants emphasize that they seek only to stay a narrow portion of discovery, the individuals whom they seek to prevent from being deposed are central to the alleged fraud, and virtually all other discovery has been completed. Thus, even if a stay were applied in the manner proposed by the Aspen defendants, it would all but grind this case to a halt. *See Sterling*, 175 F. Supp. 2d at 579 (noting that even when a party seeks to stay only ''particular depositions,'' such relief ''effectively stops the case in its tracks''). A stay would further frustrate the district court's interest in managing its caseload and expeditiously resolving the underlying suit given its complexity and the fact that it had already been pending for over a year and a half when the Aspen defendants brought their motion.

Interests of nonparties to the civil proceeding

The parties do not address the interests of nonparties in much detail, but some courts give ''real weight'' to this factor. *Golden Quality Ice Cream Co. v. Deerfield Specialty*, 87 F.R.D. 53, 58 (E.D. Pa. 1980). For example, where ''key managerial officials'' of a corporate defendant risk self-incrimination if they provide answers for the corporation in its defense of the civil suit, a court may be more inclined to grant a stay. *Id.*

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[5]We note that courts occasionally find a stay will in fact promote judicial efficiency ''because after the criminal matter is resolved and the Fifth Amendment issue gone, civil discovery will proceed more smoothly and efficiently.'' *King*, 16 P.3d at 59. Under the particular circumstances of this case, however, the district court could reasonably conclude otherwise.

Here, the corporate Aspen defendants suggest that they can only refute the Gragson plaintiffs' allegations through their employees and officers. The corporate Aspen defendants therefore assert that they will be left defenseless because these individuals will likely assert their Fifth Amendment privilege against self-incrimination. But as the Supreme Court has explained, a corporate defendant in such a circumstance has an obligation to '' 'appoint an agent who could, without fear of self-incrimination, furnish such requested information as was available to the corporation.' '' *United States v. Kordel*, 397 U.S. 1, 8 (1970) (quoting *United States v. 3963 Bottles, More or Less, etc.*, 265 F.2d 332, 336 (7th Cir. 1959)). Thus, there are less drastic measures, short of a stay, ''by which a trial court may compel discovery disclosures by a corporate defendant while at the same time protecting the Fifth Amendment rights of its employees.'' *Avant! Corp. v. Superior Court*, 94 Cal. Rptr. 2d 505, 512 (Ct. App. 2000). In any event, the employees and officers of the corporate Aspen defendants of course remain free to raise their Fifth Amendment rights should they be called as witnesses. *See id.* at 512-13. We therefore do not believe that the interests of nonparties are directly implicated.

Interest of the public in the civil and criminal matters

The final relevant factor—the effect of a stay on the public—''is perhaps the most important factor in the equation, albeit the one hardest to define.'' Milton Pollack, Sr. J., U.S. Dist. Ct., S.D.N.Y., Parallel Civil and Criminal Proceedings, 129 F.R.D. 201, 205 (Oct. 17-19, 1989). There is a ''presumption that the public has an interest in prompt resolution of civil cases.'' *Micro-financial*, 385 F.3d at 79 n.4 (citing FRCP 1, the federal counterpart to NRCP 1). In addition, the public at large has a strong interest in the swift resolution of claims brought to remedy the ''[d]issemination of false or misleading information by companies to members of the investing public.'' *Securities & Exchange Com'n v. Dresser Indus.*, 628 F.2d 1368, 1377 (D.C. Cir. 1980).

The Gragson plaintiffs have alleged that the Aspen defendants defrauded investors by operating a large-scale real estate scam that caused millions of dollars in damages. The public undoubtedly has a strong interest in rooting out such activity as quickly as possible. As noted above, the relief sought by the Aspen defendants would halt the civil proceeding indefinitely, without any way to forecast when it could return to the district court's active docket. The delay flowing from a stay would shake the public's confidence in the administration of justice. *See Keating v. Office of Thrift Supervision*, 45 F.3d 322, 326 (9th Cir. 1995) (holding that the public's interest in speedily resolving a federally insured savings and loan case outweighed the defendant's interest in a stay because, among other things, a delay ''would have been detrimental to pub-

lic confidence in the enforcement scheme for thrift institutions''); *see also Avant! Corp.*, 94 Cal. Rptr. 2d at 513 (''Clearly, the public has a significant interest in a system that encourages individuals to come to court for the settlement of their disputes.''). Thus, as with most of the other applicable factors, the public's interest in the prompt resolution of the civil proceeding weighs against a stay.

CONCLUSION

For the foregoing reasons, we conclude that the district court did not abuse its discretion in determining that, on balance, the interests of the Aspen defendants in a stay do not outweigh the countervailing interests involved.[6] Consequently, because the Aspen defendants are not entitled to the extraordinary relief requested, we deny this petition for extraordinary writ relief.[7]

CHERRY, C.J., and DOUGLAS, GIBBONS, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

CLARK COUNTY, NEVADA; BOARD OF COMMISSIONERS OF CLARK COUNTY, NEVADA; SUSAN BRAGER, CLARK COUNTY, NEVADA COMMISSIONER; STEVE SISOLAK, CLARK COUNTY, NEVADA COMMISSIONER; TOM COLLINS, CLARK COUNTY, NEVADA COMMISSIONER; LARRY BROWN, CLARK COUNTY, NEVADA COMMISSIONER; LAWRENCE WEEKLY, CLARK COUNTY, NEVADA COMMISSIONER; CHRIS GIUNCHIGLIANI, CLARK COUNTY, NEVADA COMMISSIONER; MARY BETH SCOW, CLARK COUNTY, NEVADA COMMISSIONER; AND DON BURNETTE, CLARK COUNTY, NEVADA MANAGER, APPELLANTS, *v.* SOUTHERN NEVADA HEALTH DISTRICT, RESPONDENT.

No. 59213

December 6, 2012 289 P.3d 212

Appeal from a district court order granting writs of mandamus and prohibition in a local government action. Eighth Judicial District Court, Clark County; Elissa F. Cadish, Judge.

Regional health district brought original petition seeking to compel county to fully fund health district in the amount it had requested. The district court granted writs of mandamus and prohi-

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[6]We have considered the Aspen defendants' remaining arguments and conclude that they are without merit.

[7]In light of this opinion, we vacate the stay ordered by this court on July 20, 2011.

bition in favor of health district. County appealed. The supreme court, DOUGLAS, J., held that: (1) on an issue of first impression, county was statutorily required to adopt district's budget without modification; (2) mandamus relief was appropriate; but (3) writ of prohibition was not available.

Affirmed in part and reversed in part.

[Rehearing denied March 12, 2013]

PICKERING, J., dissented in part.

Kolesar & Leatham and *Matthew J. Forstadt, Alan J. Lefebvre*, and *William D. Schuller*, Las Vegas, for Appellants.

Marquis Aurbach Coffing and *Terry A. Coffing* and *Micah S. Echols*, Las Vegas, for Respondent.

1. HEALTH.
   County was statutorily required to adopt regional health district's budget as submitted and without modification, so long as the requested amount did not exceed the statutory maximum; legislative history overwhelmingly demonstrated that the purpose behind the statute providing for funding of regional health districts was to provide health districts with a direct funding source and to limit county authority over their budgets. NRS 439.365.
2. STATUTES.
   The supreme court begins its statutory analysis with the plain meaning rule.
3. STATUTES.
   If the Legislature's intention is apparent from the face of the statute, there is no room for construction, and the supreme court will give the statute its plain meaning.
4. STATUTES.
   Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory.
5. STATUTES.
   If a statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, the supreme court will look to the provision's legislative history and the scheme as a whole to determine what the framers intended, the context and the spirit of the law or the causes that induced the Legislature to enact it.
6. MANDAMUS.
   Mandamus relief was appropriate remedy to compel county to fully fund regional health district as required by statute, where statute governing such funding did not provide any statutory remedy for a health district to compel a county to comply with statutory funding requirements. NRS 439.365.
7. MANDAMUS.
   A writ of mandamus is available to compel the performance of an act that the law especially enjoins as a duty resulting from an office, trust or station, or to control an arbitrary or capricious exercise of discretion. NRS 34.160.

8. COURTS.
   The supreme court reviews a district court's grant or denial of a writ petition under an abuse of discretion standard.
9. COURTS.
   On review of a district court's grant or denial of a writ petition, related statutory and legal issues are reviewed de novo.
10. HEALTH; PROHIBITION.
    County's evaluation and approval of regional health district's budget involved legislative rather than judicial functions, and therefore, a writ of prohibition barring county from further noncompliance with direct funding requirement of statute governing health district funding was not an available remedy to compel statutory compliance. NRS 439.365.

Before the Court EN BANC.

OPINION

By the Court, DOUGLAS, J.:

In this appeal we address, for the first time, the level of discretion that a county has to determine how much to fund a regional health district under NRS 439.365, which sets forth the budgeting and funding process for health districts in counties with populations over 700,000. Under this statute, we address whether counties have the discretion to fund a health district in an amount less than that requested by the health district, or whether the county must simply approve the budget submitted by the health district up to the statutory maximum set forth in NRS 439.365(2). Because we conclude that NRS 439.365 is ambiguous, we look to the statute's legislative history to resolve this issue, and as the legislative history overwhelmingly demonstrates that NRS 439.365 was designed to provide health districts with a dedicated funding source that would not be subject to the unabated discretion of the county, we conclude that, under this statute, a county must fund the health district at the amount requested, so long as that amount does not exceed NRS 439.365(2)'s statutory cap.

BACKGROUND

In June 2011, respondent Southern Nevada Health District (SNHD) filed in district court a petition for writs of mandamus and prohibition regarding its budget dispute with appellants Clark County, Nevada; the Board of Commissioners of Clark County, Nevada; County Commissioners Susan Brager, Steve Sisolak, Tom Collins, Larry Brown, Lawrence Weekly, Chris Giunchigliani, and Mary Beth Scow; and Don Burnette, Clark County, Nevada, Manager (hereinafter Clark County). SNHD's writ petition alleged that, in 2005, the Nevada Legislature enacted legislation,

specifically NRS 439.365, that mandated direct funding of SNHD out of Clark County's budget and that Clark County was improperly attempting to fund SNHD below the statutorily mandated budget level. More specifically, SNHD argued that, under NRS 439.365(2), it was entitled to the statutory cap of 3.5 cents on every $100 of assessed valuation of all taxable property, but that Clark County was attempting to improperly reduce its budget to a significantly lesser amount. Therefore, SNHD petitioned the district court to compel Clark County to fully fund SNHD in the amount that it had requested and to prohibit Clark County from interfering with its funding in the future.

Clark County filed an opposition to the writ. Broadly summarized, Clark County primarily argued that SNHD was misreading NRS Chapter 439 in its belief that it was statutorily entitled to a specific level of funding and that the relevant statutes are best read as providing Clark County with the discretion to set SNHD's budget. In addition, Clark County filed a ''responsive pleading'' to the writ petition, which reads as an answer to a complaint. This document also included a counterclaim seeking various types of relief connected to the budget dispute. As part of its counterclaim, Clark County asserted that NRS Chapter 439 gave it an instrumental and authoritative role in the budget funding process for SNHD, and that SNHD was seeking money to which it was not legally entitled. Therefore, Clark County's counterclaim sought dismissal of SNHD's petition with costs to be assessed, an accounting, compensatory damages, interest, attorney fees, and any other relief provided under law and equity.

The district court held a hearing on SNHD's writ petition during which, after considering the parties' arguments, it concluded that it would rule in SNHD's favor on the petition. Thereafter, the district court entered a written order granting the writs of mandamus and prohibition sought by SNHD. More specifically, the district court concluded that the controlling statute, NRS 439.365, was ambiguous as to whether Clark County could exercise control over the amount of funding SNHD receives in its annual budget. The district court then concluded that it would resort to legislative history to resolve this ambiguity, and that based on this review, the Legislature appeared to have intended the direct funding source to which SNHD asserted it was entitled. Therefore, the district court issued a writ of mandamus ordering Clark County to fully fund SNHD at the requested level for fiscal year 2012, in monthly installments, and a writ of prohibition restraining Clark County from any future noncompliance with directly funding SNHD at the full amount required by NRS 439.365, so long as that amount does not exceed the 3.5-cent calculation. The district court further held that this prohibition was to apply to all future SNHD fiscal-year budgets. Finally, the district court noted that since it was

granting SNHD's writ petition, the counterclaims raised by Clark County were dismissed with prejudice. This appeal by Clark County followed.

DISCUSSION

[Headnote 1]

We begin our analysis of the issues presented in this appeal by examining NRS 439.365 under this court's rules of statutory construction and evaluating the parties' competing interpretations of that statute. Concluding that SNHD correctly argues that this statute requires counties to fund health districts at the amount requested, up to the statutory cap set forth in NRS 439.365(2), we then turn to whether, by seeking writs of mandamus and prohibition, SNHD utilized the appropriate vehicles to compel Clark County to comply with the requirements of NRS 439.365.

Health districts

As part of a series of legislation enacted in 2005, health districts are mandated for counties—such as Clark County—with populations of 700,000 or more.[1] NRS 439.361. In these counties, any preexisting county, city, or town boards of health were abolished, NRS 439.362(7), with their powers, duties, and authority transferred to the newly created health districts, which have ''jurisdiction over all public health matters in the health district,'' NRS 439.366(2), and which may adopt regulations that have been approved by the State Board of Health. NRS 439.366(3). And in counties where health districts are required, the board of county commissioners is required to create a health district fund in the county treasury, NRS 439.363(1), which ''may only be used to provide funding for the health district.''[2] NRS 439.363(2).

The funding process for a health district's annual budget is set forth by statute in NRS 439.365, which provides in its entirety:

> 1. The district board of health shall prepare an annual operating budget for the health district. The district board of health shall submit the budget to the board of county commissioners before April 1 for funding for the following fiscal year. The budget must be adopted by the board of county commissioners as part of the annual county budget.

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[1]A separate set of statutes apply to the creation of health districts in counties with populations less than 700,000. *See* NRS 439.369-.410. Health districts are optional in these smaller counties. *See* NRS 439.370.

[2]Health districts may also receive and disburse federal money and submit applications to and enter into agreements with federal agencies. NRS 439.367(1). Additional funding can come from private, state, or local sources. NRS 439.367(2).

> 2. The board of county commissioners shall annually allocate for the support of the health district an amount that does not exceed an amount calculated by multiplying the assessed valuation of all taxable property in the county by the rate of 3.5 cents on each $100 of assessed valuation. The amount allocated pursuant to this subsection must be transferred from the county general fund to the health district fund created by the board of county commissioners pursuant to NRS 439.363.

At issue in this appeal is whether NRS 439.365 provides counties with the authority to modify a health district's budget from the figure requested by the health district pursuant to NRS 439.365(1) and to allocate this modified amount, rather than the amount requested, for the support of the health district.

Rules of statutory construction

[Headnotes 2-5]

This court begins its statutory analysis with the plain meaning rule. *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008). If the Legislature's intention is apparent from the face of the statute, there is no room for construction, and this court will give the statute its plain meaning. *Madera v. SIIS*, 114 Nev. 253, 257, 956 P.2d 117, 120 (1998). Statutes should be read as a whole, so as not to render superfluous words or phrases or make provisions nugatory. *Southern Nev. Homebuilders v. Clark County*, 121 Nev. 446, 449, 117 P.3d 171, 173 (2005). If the statute is ambiguous, meaning that it is capable of two or more reasonable interpretations, *In re Candelaria*, 126 Nev. 408, 411, 245 P.3d 518, 520 (2010), this court will ''look to the provision's legislative history and the . . . scheme as a whole to determine what the . . . framers intended,'' *We the People*, 124 Nev. at 881, 192 P.3d at 1171, and we will examine '' 'the context and the spirit of the law or the causes which induced the legislature to enact it.' '' *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007) (quoting *McKay v. Bd. of Supervisors*, 102 Nev. 644, 650-51, 730 P.2d 438, 443 (1986)); *accord State, Bus. & Indus. v. Granite Constr.*, 118 Nev. 83, 87, 40 P.3d 423, 426 (2002).

The parties' plain language arguments

The district court concluded, without explanation, that the statute was ambiguous and, based on the legislative history of NRS 439.365, the statute required Clark County to approve SNHD's budget at the amount requested up to the statutory maximum. Both parties contend that the statute is not ambiguous, and they advance competing plain meaning arguments.

Clark County maintains that the plain language of this statute supports its view that NRS 439.365 gives it the discretion to determine the amount of funding SNHD will receive. To support this contention, Clark County focuses on the use of two phrases in NRS 439.365: ''an amount that does not exceed'' and ''annual operating budget.'' First, Clark County argues that NRS 439.365(2), which requires the county to ''annually allocate for the support of the health district an amount that does not exceed'' the statutory cap set forth in that subsection, establishes a ceiling on the amount that can be allocated to SNHD, however, that does not mean that SNHD automatically receives the statutory maximum or any other amount that it requests. Instead, Clark County asserts that that language gives it the discretion to determine the amount that will be allocated to SNHD, up to the maximum amount allowed by the statute. Second, Clark County highlights the statutory phrase ''annual operating budget,'' used in NRS 439.365(1)'s first sentence, and asserts that this terminology should be distinguished from a ''capital budget,'' thus giving Clark County the authority to reject budget requests for capital projects, such as purchasing a new office building, as such items go beyond the plain statutory mandate of an ''operating budget.''[3]

SNHD focuses its plain language argument on the final sentence of NRS 439.365(1) and the first sentence of NRS 439.365(2). With regard to the last sentence of NRS 439.365(1), which provides that ''[t]he budget [submitted by the health district] must be adopted by the board of county commissioners as part of the annual county budget,'' SNHD points to the use of the term ''must'' in this sentence and argues that this mandatory language ''removes Clark County's discretion to approve or disapprove SNHD's budget.'' To further support this argument, SNHD emphasizes the phrase ''shall annually allocate for the support of the health district,'' in the first sentence of subsection 2 of this statute, contending that this language makes the allocation of funds to SNHD mandatory. Based on the language in these two sentences, SNHD maintains that

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[3]With regard to Clark County's argument that use of the term ''operating budget'' in NRS 439.365(1) demonstrates that it has the authority to reject capital requests in SNHD's budget, because ''operating budget'' is not defined by that statute, we conclude that this argument highlights an additional ambiguity in NRS 439.365. We need not define this phrase or otherwise address this argument, however, because this argument is not properly before the court. Notably, there is nothing in the record to support a conclusion that SNHD's budget specifically sought funding for alleged capital items nor is there anything demonstrating that Clark County struck any requests on that basis. Instead, the record reflects that Clark County simply reduced SNHD's budget to an amount it deemed appropriate, without explaining the basis for that reduction. Absent any actual efforts to eliminate capital requests from SNHD's budget, no actual controversy exists with regard to the operating versus capital budget distinction drawn by Clark County.

NRS 439.365 requires Clark County to approve its budget without making any modifications to the amount requested, so long as the budget does not exceed the maximum amount dictated by NRS 439.365(2).

The inherent weakness in both of the parties' arguments is that they focus exclusively on the specific words and phrases in NRS 439.365 that they contend support their interpretations of the statute. It is well settled that, in interpreting a statute, this court must examine the statute as a whole. *See Southern Nev. Homebuilders*, 121 Nev. at 449, 117 P.3d at 173. But when NRS 439.365 is read in its entirety, the parties' respective arguments highlight a discrepancy in the statute between the final sentence of subsection 1, where the mandatory language implies that a county has no control over a health district's budget, and the first sentence of subsection 2, which appears to provide the county with the authority to fix the health district's budget, up to the statutory maximum. Thus, when the statute is read as a whole, both the interpretation offered by Clark County—that NRS 439.365 gives it discretionary authority over SNHD's budget—and that offered by SNHD—that the county has no such authority and must approve the budget as submitted, so long as it does not exceed the statutory maximum—can be deemed reasonable. As a result, like the district court, we conclude that NRS 439.365 is ambiguous, *see In re Candelaria*, 126 Nev. at 411, 245 P.3d at 520 (providing that statutory language is ambiguous when it is capable of more than one reasonable interpretation), and thus, we turn to the legislative history to determine the statute's proper construction.[4] *Leven*, 123 Nev. at 404, 168 P.3d at 716.

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[4]In asserting that the district court's decision to grant extraordinary writ relief should be reversed and remanded, our dissenting colleague focuses her interpretation of NRS 439.365 on the application of the Local Government Budget and Finance Act, NRS 354.470-.626, to the budgeting dispute issue raised in this appeal. This argument is not properly before us, as neither party advanced this argument in the district court or on appeal; thus, we do not consider it now. *See Edwards v. Emperor's Garden Rest.*, 122 Nev. 317, 330 n.38, 130 P.3d 1280, 1288 n.38 (2006) (stating that, when a party fails to make arguments or provide citations to relevant authority addressing an issue, this court need not consider that issue in resolving the appeal).

The dissent further maintains that our interpretation of this statute effectively reads the words ''does not exceed'' out of subsection 2 of this statute, before going on to reject our conclusion that NRS 439.365 is ambiguous. To reach this result, our dissenting colleague fails to account for the mandatory language of NRS 439.365(1), which provides that the budget submitted by the health district ''must be adopted'' by the county. It is the discrepancy between this mandatory language and the language of subsection 2, appearing to give the county discretion to fix the health district's budget up to the statutory maximum, that creates the ambiguity that we address here today by applying this court's well-established principles of statutory construction that, when a statute is ambiguous, this court looks to the statute's legislative history to determine the framers' intent and examines the context and spirit of the law or the rea-

Legislative history

In the underlying proceeding, once the district court determined that NRS 439.365 was ambiguous, it looked to the statute's legislative history and concluded that the legislative history demonstrated that ''the Legislature intended to provide SNHD with a direct source of funding,'' and thus, the district court adopted SNHD's interpretation of this statute.[5] Indeed, NRS 439.365's legislative history overwhelmingly demonstrates that the purpose behind the statute was to provide health districts with a direct funding source and to limit county authority over their budgets.

During the Legislature's consideration of Assembly Bill 380, the bill that ultimately resulted in, among other statutes, NRS 439.365, one proponent of the bill, Dan Musgrove, the Director of Intergovernmental Relations for the Office of the County Manager, Clark County, Nevada, testified:

> Our amendment does two things, and this was on our discussions with [Assemblyman] Parks as to what he envisioned and what we thought would be the best thing for [SNHD] going forward, in terms of *an established funding source*. The first thing is to go ahead and allow for them to have a tax levy not to exceed $3.25 per $100 of taxable property. Now, that is simply shifting of an existing countywide rate so that there isn't any increase at all, in terms of the countywide rate. *It's simply a redistribution of existing funds that would go directly to [SNHD]* . . . .

Hearing on A.B. 380 Before the Assembly Comm. on Health and Human Services, 73d Leg. (Nev., April 6, 2005) (statement of Dan Musgrove, Director of Intergovernmental Relations, Office of the County Manager, Clark County) (emphases added). Mr. Musgrove further explained that the bill provided ''a designated fund-

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soning that induced the Legislature to enact that statute. *We the People Nevada v. Secretary of State*, 124 Nev. 874, 881, 192 P.3d 1166, 1170-71 (2008); *Leven v. Frey*, 123 Nev. 399, 405, 168 P.3d 712, 716 (2007).

[5]On appeal, Clark County fails to address NRS 439.365's legislative history and instead argues that, if this court concludes that the statute is ambiguous, it should ignore the legislative history and adopt its position that the statute provides counties with discretion to determine the amount of a health district's budget. Relying on *J.E. Dunn Northwest v. Corus Construction Venture*, 127 Nev. 72, 249 P.3d 501 (2011), for the proposition that this court avoids absurd results when resolving statutory ambiguities, Clark County maintains that, in a time of severe budget shortfalls, it would be absurd to conclude that it does not have the authority to set SNHD's budget at an amount of its choosing, up to the statutory maximum. This argument lacks merit. Indeed, if we were to adopt this argument, then any direct funding statute, such as NRS 387.195, which directs boards of county commissioners to ''levy a tax of 75 cents on each $100 of assessed valuation of taxable property within the county for the support of the public schools within the county school district,'' would become of questionable validity.

ing stream to allow [SNHD] some long-term planning,'' because SNHD ''really had no way of knowing whether the County Commission was going to provide them the funding from year to year, and this would give them a designated funding source.'' *Id.* At the bill's next legislative hearing before the Assembly Committee on Health and Human Services, the proposed bill was summarized by the Legislative Counsel Bureau as containing ''a guaranteed revenue source for the funding of a health district through a property tax levy.'' Hearing on A.B. 380 Before the Assembly Comm. on Health and Human Services, 73d Leg. (Nev., April 13, 2005) (statement of Barbara Dimmitt, Committee Policy Analyst, Legislative Counsel Bureau). Legislative Committee Chairwoman Sheila Leslie, along similar lines, commented that:

> As I understand it, the advantage to this is for [SNHD], and it provides them a dedicated funding stream. Before this proposed bill, they have to come in and ask the county commission every year, and depending on how the commissioners feel about the department, their budget might go up or down.

Id. (statement of Shelia Leslie, Chairwoman, Committee on Health and Human Services). This testimony demonstrates that, in enacting this bill, the Legislature intended to create a system that provided health districts with a revenue stream free from county interference. In light of this legislative history, we conclude, as the district court did, that NRS 439.365 requires a county to adopt the budget submitted by a health district, without modification, so long as the amount requested does not exceed the 3.5 cents per $100 cap set forth in NRS 439.365(2).

Propriety of writ relief

[Headnote 6]

After adopting its interpretation of NRS 439.365, the district court concluded that extraordinary relief was warranted, and as such, it granted SNHD's petition for a writ of mandamus and a writ of prohibition. The district court's issuance of a writ of prohibition is problematic, however; accordingly, we now turn to the propriety of the district court's grant of SNHD's requests for writ relief.

[Headnotes 7-9]

A writ of mandamus is available ''to compel the performance of an act which the law especially enjoins as a duty resulting from an office, trust or station,'' NRS 34.160, or ''to control an arbitrary or capricious exercise of discretion.'' *Berrum v. Otto*, 127 Nev. 372, 377, 255 P.3d 1269, 1272 (2011) (internal quotations omitted). A writ of prohibition may issue to arrest the proceedings of

any tribunal, corporation, board, or person exercising judicial functions, when such proceedings are in excess of the jurisdiction of such tribunal, corporation, board, or person. NRS 34.320. Both mandamus and prohibition are available only when the petitioner has no plain, speedy, or adequate remedy at law. NRS 34.170 (mandamus); NRS 34.330 (prohibition). This court reviews a district court's grant or denial of a writ petition under an abuse of discretion standard. *DR Partners v. Bd. of County Comm'rs*, 116 Nev. 616, 621, 6 P.3d 465, 468 (2000). Related statutory and legal issues, however, are reviewed de novo. *Berrum*, 127 Nev. at 377, 255 P.3d at 1272.

In the underlying case, the district court granted SNHD's request for mandamus relief to direct Clark County ''to fully fund SNHD for fiscal year 2012'' at the amount requested by SNHD. The district court further granted SNHD a writ of prohibition to restrain Clark County ''from further noncompliance with SNHD's direct funding mandated by the Legislature'' under NRS 439.365. This writ of prohibition applies ''to [all] future budgets proposed by SNHD that 'must be adopted' by Clark County so long as [they] do not exceed the 3.5 cent calculation set forth in NRS 439.365(2).'' On appeal, the parties make no arguments regarding whether mandamus and/or prohibition were the appropriate remedies for resolving their budget dispute.[6]

Because NRS Chapter 439 does not provide any statutory remedy for a health district to compel a county to comply with the funding requirements of NRS 439.365 and given that SNHD is seeking funds that, under our interpretation of that statute, Clark County improperly withheld, we conclude that a writ of mandamus represents the proper vehicle for compelling Clark County to comply with its duty to fully fund SNHD in compliance with NRS 439.365. *Berrum*, 127 Nev. 372, 255 P.3d 1269 (affirming a district court's grant of mandamus relief to taxpayers seeking refunds from a county treasurer when there was no other adequate statutory or legal remedy and the treasurer had a duty to refund the amounts requested). Thus, we affirm the district court's grant of mandamus relief.

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[6]Clark County does reassert its district court position that, because SNHD is a political subdivision of Clark County, it cannot sue Clark County ''to force it to do anything . . . at variance with NRS 439.365(2).'' It further contends that political subdivisions of a state cannot challenge the validity of a state statute under the Fourteenth Amendment, citing *City of South Lake Tahoe v. California Tahoe*, 625 F.2d 231, 233 (9th Cir. 1980). SNHD, however, seeks to compel Clark County's compliance with NRS 439.365, not to force it to act at variance with that statute. Moreover, SNHD is not challenging the validity of NRS 439.365, under the Fourteenth Amendment or otherwise. Thus, we conclude that these assertions are not germane to the resolution of the issues before us.

[Headnote 10]

With regard to the writ of prohibition granted by the district court, however, such relief is available only to arrest the proceedings of an individual or entity exercising judicial functions when such proceedings are in excess of the individual or entity's jurisdiction. NRS 34.320. Here, Clark County's evaluation and approval of SNHD's budget involves legislative rather than judicial functions. As a result, the district court abused its discretion in granting a writ of prohibition to bar Clark County from further noncompliance with the direct funding requirement of NRS 439.365. As was the case with directing Clark County to fully comply with the direct funding requirements of NRS 439.365, the proper vehicle for compelling Clark County's continued compliance with this requirement was through a writ of mandamus. We therefore reverse in part the district court's order for the limited purpose of revising its order to reflect that the relief it granted through a writ of prohibition is instead achieved through the issuance of a writ of mandamus.

CONCLUSION

NRS 439.365 is ambiguous. Based on the statute's legislative history, it must be interpreted as requiring a county to adopt a health district's budget as submitted and without modification, so long as the requested amount does not exceed the statutory maximum set forth in NRS 439.365(2). With regard to the remedy utilized by the district court, we find no abuse of discretion in its grant of a writ of mandamus, but conclude that prohibition relief was improperly granted, as Clark County's participation in the budgeting process does not involve the exercise of judicial functions. As a result, we affirm the district court's order in part and reverse in part, for the limited purpose of the district court's correction of its order so that the relief provided through a writ of prohibition is achieved by issuing a writ of mandamus.[7]

CHERRY, C.J., and SAITTA, GIBBONS, HARDESTY, and PARRAGUIRRE, JJ., concur.

PICKERING, J., concurring in part and dissenting in part:

Mandamus is an extraordinary remedy. It commands—mandates—that an act be performed, exactly as ordered, no questions asked. Mandamus will not issue unless the act to be compelled is ''ministerial,'' *Collier v. Legakes*, 98 Nev. 307, 310, 646 P.2d 1219, 1221 (1982), that is to say, a matter of duty,

[7]Having considered the parties' remaining arguments, we conclude that they either lack merit or need not be addressed in light of the basis for our resolution of this matter. Additionally, we vacate the stay of the district court's order imposed by our January 5, 2012, order.

NRS 34.160, not discretion. *Round Hill Gen. Imp. Dist. v. Newman*, 97 Nev. 601, 603, 637 P.2d 534, 536 (1981).

In upholding mandamus in this case, the majority decides that Clark County must annually allocate 3.5 cents of every $100 of assessed valuation on all property in the county to the Southern Nevada Health District (SNHD). This is not what NRS 439.365 says. It says that Clark County must annually allocate ''an amount that *does not exceed*'' that sum to SNHD. NRS 439.365(2) (emphasis added). ''Does not exceed'' or ≤ means something different from ''equals'' or = both linguistically and mathematically. The majority cites witness testimony during the hearings on Assembly Bill 380 to support its singular reading of NRS 439.365.[1] But witness testimony in support of a bill should not be used to rewrite statutory text, or to create an ambiguity the statute's text does not reveal. ''[L]egislative history—no matter how clear—can't override statutory text.'' *Hearn v. Western Conf. of Teamsters Pension Fund*, 68 F.3d 301, 304 (9th Cir. 1995).

More troubling, resolving this dispute by means of mandamus says that neither Clark County nor anyone else has any discretion when it comes to SNHD's operating budget once SNHD sets it.[2] Per the majority, Clark County's obligation to allocate 3.5 cents of every $100 of assessed valuation in the county to SNHD exists without regard to demonstrated need, availability of federal and private funds, and competing demands for government services. So read, NRS 439.365 is in conflict with the Local Government Budget and Finance Act, NRS 354.470-354.626, to which NRS 439.365(1)'s text and calendaring provisions seem deliberately tied. While I recognize that the appellants did not directly invoke the Local Government Budget and Finance Act in support of their appeal, this court nonetheless ''has a duty to construe statutes as a whole, so that all provisions are considered together and, to the extent practicable, reconciled and harmonized.'' *Cromer v. Wilson*, 126 Nev. 106, 110, 225 P.3d 788, 790 (2010); *NAIW v. Nevada Self-Insurers Association*, 126 Nev. 74, 84, 225 P.3d 1265, 1271

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[1]The majority also cites NRS 387.195, the school funding statute, as support for its reading of NRS 439.365. Unlike NRS 439.365, NRS 387.195 is unqualified in its allocation and does not use NRS 439.365's ''does not exceed'' qualifying language. NRS 387.195 does not support, rather, it undermines, the majority's reading of NRS 439.365.

[2]That SNHD determines its demand formulaically, not by reference to its actual or projected operating expenses or other available funds, is suggested by the limited record available. Thus, SNHD initially contended that its operating budget and, hence, Clark County's mandatory funding obligation, equaled $19,870,482; it came up with that number mathematically, by applying the ''3.5 cents on each $100 of assessed valuation'' provided for in NRS 439.365(2) to the assessed valuation of all taxable property in Clark County. It recalculated that number upward by $1,690,000 after the May 26, 2011, decision in *Clean Water Coalition v. The M Resort*, 127 Nev. 301, 255 P.3d 247 (2011), augmented Clark County's operating funds.

(2010) (''We presume that the Legislature enact[s a new] statute with full knowledge of existing statutes relating to the same subject.'' (quotation omitted)).

Statutory construction does not proceed in a vacuum. Clark County is a local government and as such is fully subject to the Local Government Budget and Finance Act, NRS 354.470-354.626, whose purposes are, among others, ''[t]o provide for the control of revenues, expenditures and expenses in order to promote prudence and efficiency in the expenditure of public money'' and ''[t]o provide specific methods enabling the public, taxpayers and investors to be apprised of the financial preparations, plans, policies and administration of all local governments.'' NRS 354.472(1)(d), (e). The Act defines ''*budget*'' as ''a plan of financial operation embodying an estimate of *proposed* expenditures and expenses for a given period and the *proposed* means of financing them.'' NRS 354.492 (emphasis added). Under NRS 354.596, Clark County's ''budget'' is ''tentative'' and must be submitted ''[o]n or before April 15'' of each year to the Department of Taxation, NRS 354.596(2), while ''notice of the time and place of a public hearing on the tentative budget'' must be provided, NRS 354.596(3), ''at which time interested persons must be given an opportunity to be heard.'' NRS 354.598(1). Only after the public hearing is held (on the third Monday in May, NRS 354.596(4)(a)), and then only upon ''the favorable votes of a majority of all members of the governing body,'' NRS 354.598(2), does Clark County's ''budget'' move from a tentative budget presenting ''proposed expenditures'' to final.

NRS 439.365 is a budgeting and funding statute and, as such, should be read in the context of the Local Government Budget and Finance Act, NRS 354.470-354.626. Thus, NRS 439.365(1) provides that SNHD ''shall prepare an annual operating budget,'' that it ''shall submit the budget to the board of county commissioners before April 1 for funding for the following fiscal year,'' and that ''[t]he budget must be adopted by the board of county commissioners as part of the annual county budget.'' What I take this to mean is that SNHD is tasked with preparing a ''budget''—that is, ''an estimate of proposed expenditures and expenses'' for the coming year, NRS 354.492—that it must submit to Clark County by April 1. NRS 439.365(1). Two weeks later, on April 15, Clark County must in turn file its budget, presumably incorporating SNHD's submission, and schedule and give notice of the public hearing required to be held in late May. NRS 354.596. But neither the budget SNHD submits to Clark County nor the budget Clark County files and submits to public hearing becomes final until publicly aired and voted on by ''all members of the governing body,'' NRS 354.598(2), that is, the Clark County Commission.

For the Local Government Budget and Finance Act public hearing process to be meaningful, submission of a true operating budget, one calculated with reference to need, not entitlement, is essential. I thus reject SNHD's reading of NRS 439.365 as imposing a mandatory funding obligation in an amount automatically equal to the number arrived at ''by multiplying the assessed valuation of all taxable property in the county by the rate of 3.5 cents on each $100 of assessed valuation.'' NRS 439.365(2). SNHD's interpretation not only reads the words ''an amount that does not exceed'' out of NRS 439.365(2), it fails to harmonize NRS 439.365 with the provisions of the Local Government Budget and Finance Act.

Ordinarily, budgeting is discretionary and inherently legislative, making it inappropriate for mandamus relief. *Cf. Young v. Board of County Comm'rs*, 91 Nev. 52, 56, 530 P.2d 1203, 1206 (1975) (dictum); *see also Co. of Washoe v. City of Reno*, 77 Nev. 152, 155-57, 360 P.2d 602, 603-04 (1961) (reversing district court issuance of writ of mandamus where the city could sue the county for damages for breach of statutory obligation to fund road work). However, an official's failure to exercise discretion when its exercise is required can violate a duty, permitting mandamus relief to compel the official to undertake the discretionary review process, though not to dictate its outcome. *Collier*, 98 Nev. at 310, 646 P.2d at 1221. And this court has recognized that budgetary requests, when stipulated as reasonable, can become a duty. *Young*, 91 Nev. at 56, 530 P.2d at 1206. The record in this case is extremely limited, and what there is suggests that both SNHD, *see supra* note 2, and Clark County,[3] have taken categorical positions, rather than engage in a dialogue over reasonable operating budget needs. This suggests the possibility of relief under theories recognized in cases like *Collier*, *Young*, or *County of Washoe*, as well as fact-based questions as to whether SNHD has improperly included capital expenditures in its operating expenses. Given the importance of these issues, and their sensitivity, I would reverse and remand for discovery and further development as to the budgeting process involved in this case.

I agree with the majority that prohibition is inappropriate in this case. However, I do not agree with the majority's reading of NRS 439.365 or its issuance of mandamus on this record and therefore respectfully dissent.

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[3]From what appears in the limited record available, Clark County allocated SNHD only $5,692,495, when it had funded SNHD at between three and four times that number in the past; no explanation is provided as to how the new number was derived.

UNITED RENTALS HIGHWAY TECHNOLOGIES, INC., A DELAWARE CORPORATION, APPELLANT, *v.* WELLS CARGO, INC., A NEVADA CORPORATION, RESPONDENT.

No. 55331

UNITED RENTALS HIGHWAY TECHNOLOGIES, A DELAWARE CORPORATION, APPELLANT, *v.* WELLS CARGO, INC., A NEVADA CORPORATION, RESPONDENT.

No. 56701

UNITED RENTALS HIGHWAY TECHNOLOGIES, A DELAWARE CORPORATION, APPELLANT, *v.* WELLS CARGO, INC., A NEVADA CORPORATION, RESPONDENT.

No. 56923

December 6, 2012 289 P.3d 221

Consolidated appeals from district court orders and a judgment in a negligence and indemnity action. Eighth Judicial District Court, Clark County; Susan Johnson, Judge.

Injured motorist brought action against contractor and subcontractor of road improvement project. Contractor sought indemnification and defense from subcontractor pursuant to contract. The district court entered judgment on jury verdict in favor of subcontractor but granted contractor's motion to enforce indemnification. Subcontractor appealed. The supreme court, HARDESTY, J., held that: (1) on an issue of first impression, subcontractor's duty to indemnify was limited to the extent damages were caused by subcontractor; and (2) duty to defend is limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against claims arising from indemnitee's own negligence.

Reversed.

[Rehearing denied February 5, 2013]

Alverson, Taylor, Mortensen & Sanders and *Nathan R. Reinmiller* and *Sabrina G. Mansanas*, Las Vegas, for Appellant.

Hall, Jaffe & Clayton, LLP, and *Steven T. Jaffe, Ashlie L. Surur*, and *Phil W. Su*, Las Vegas, for Respondent.

1. APPEAL AND ERROR; INDEMNITY.
   The interpretation of an indemnity clause within a contract is a question of law, which the supreme court will review de novo.
2. APPEAL AND ERROR.
   The supreme court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.

3. INDEMNITY.
   ''Contractual indemnity'' is where, pursuant to a contractual provision, two parties agree that one party will reimburse the other party for liability resulting from the former's work.
4. INDEMNITY.
   When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; rather, it is enforced in accordance with the terms of the contracting parties' agreement.
5. INDEMNITY.
   A provision in a contract purporting to indemnify the indemnitee for the indemnitee's own negligence must be strictly construed.
6. INDEMNITY.
   Subcontractor's duty to indemnify general contractor pursuant to contract between the parties concerning road improvement project was limited to the extent subcontractor caused the damages, and therefore subcontractor did not have duty to indemnify contractor after jury found that subcontractor did not proximately cause the underlying accident that led to negligence action against contractor and subcontractor; contractual language at issue provided that indemnification would occur ''to the extent'' that any injury or damage was ''caused'' by the subcontractor, and indemnity provisions were to be strictly construed.
7. INDEMNITY.
   Subcontractor's duty to defend general contractor in underlying negligence action to the extent damages were caused by subcontractor pursuant to contract between parties for road improvement project was not triggered until such causation was shown, where there was no language in the contract imposing a duty to defend contractor beginning at the time a claim was asserted.
8. INDEMNITY.
   An indemnity clause imposing a duty to defend is construed under the same rules that govern other contracts.
9. INDEMNITY.
   The duty to defend is broader than the duty to indemnify because it covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable.
10. INDEMNITY.
    Generally, a contractual promise to defend another against specified claims clearly connotes an obligation of active responsibility, from the outset, for the promisee's defense against such claims.
11. INDEMNITY.
    While the duty to defend is broad, it is not limitless.
12. INDEMNITY.
    Unlike an insurance agreement, which typically requires an insurer to defend all claims against the insured regardless of the claim's merit, the duty to defend outlined in an indemnification provision is subject to strict construction of the contract language.
13. INDEMNITY; INSURANCE.
    While ambiguities in a policy of insurance are construed against the insurer because the insurer might be in a superior bargaining position to the insured, in noninsurance contexts, it is the indemnitee who may often have superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault.

14. INDEMNITY.
    Unless specifically otherwise stated in the indemnity clause, an indemnitor's duty to defend an indemnitee is limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against claims arising from the indemnitee's own negligence.
15. CONTRACTS.
    The supreme court will not attempt to increase the legal obligations of the parties when the parties intentionally limited such obligations in the contract.
16. CONTRACTS.
    Every word in a contract must be given effect if at all possible.

Before SAITTA, PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

In these appeals, we consider what effect specific contract language has on an indemnitor's duty to indemnify and defend an indemnitee in a personal injury action, where that language provides that indemnification will occur ''to the extent'' that any injury or damage is ''caused'' by the indemnitor.

Appellant United Rentals Highway Technologies, Inc., contracted to provide traffic control on a road improvement project coordinated and facilitated by respondent Wells Cargo, Inc. The parties' contract required United Rentals to indemnify, defend, and hold harmless Wells Cargo to the extent that United Rentals caused any injury or damage. A woman was injured in connection with the road improvement project and sued United Rentals, Wells Cargo, and other defendants for negligence. Wells Cargo sought indemnification and defense from United Rentals, but United Rentals consistently denied that it was obligated to provide indemnification and defense.

We conclude that a plain reading of the contractual indemnity language imposes a causal limitation on United Rentals' duty to indemnify and defend Wells Cargo. Because the jury found that United Rentals did not proximately cause the underlying accident, we conclude that United Rentals did not have a duty to indemnify or defend Wells Cargo, and we reverse the judgment of the district court.[1]

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[1]Causation is an element of the tort of negligence. *See Sanchez v. Wal-Mart Stores*, 125 Nev. 818, 824, 221 P.3d 1276, 1280 (2009). Here, the jury expressly found that United Rentals' negligence (presumably, its failure to exercise the requisite standard of care) was not the proximate cause of the accident. Thus, our analysis is premised on this finding by the jury.

FACTS AND PROCEDURAL HISTORY

In 2004, Wells Cargo entered into a contract with project owner Howard Hughes Corporation to perform work as a general contractor on a road improvement project. Shortly after, Wells Cargo and United Rentals executed a contract whereby United Rentals would act as a subcontractor on the project to assist with traffic control. The contract, which was drafted by Wells Cargo, contained the following indemnification provision relevant to this appeal:

> The Subcontractor . . . shall indemnify, defend and hold the General Contractor [and] Owner . . . harmless from and against all claims, losses, costs and damages, including but not limited to attorneys' fees, pertaining or allegedly pertaining to the performance of the Subcontract and involving personal injury . . . or damage to tangible property . . . , including loss of use of property resulting therefrom, economic loss, or other claims or damages, *to the extent caused* in whole or in part by the negligent acts or omissions or other fault of the Subcontractor . . . . This indemnification agreement is binding on the Subcontractor . . . to the fullest extent permitted by law, regardless of whether any or all of the persons and entities indemnified hereunder are responsible in part for the claims, damages, losses or expenses for which the Subcontractor . . . is obligated to provide indemnification.

(Emphasis added.) Further, the contract required that Wells Cargo be named as an additional insured on certain liability insurance policies procured by United Rentals.

During construction of the road project, Antonette Kodera was driving her motorcycle when she allegedly hit an unmarked bump in the road, lost control of the motorcycle, and sustained serious injuries. Kodera filed a complaint against multiple defendants, including Wells Cargo and Howard Hughes Corporation, alleging negligence. Wells Cargo and Howard Hughes Corporation each filed an answer denying liability. Kodera later amended her complaint to name additional defendants, including United Rentals. She alleged that Howard Hughes Corporation, Wells Cargo, United Rentals, and other defendants were negligent because the unmarked bump was dangerous, the defendants failed to provide appropriate warning of the bump's presence, and/or the defendants failed to remove the dangerous or hazardous condition that caused her injuries.

Soon after Kodera added United Rentals as a defendant, Wells Cargo tendered its defense to United Rentals and an insurance carrier for United Rentals. Both tenders allegedly went unanswered.

As a result, Wells Cargo filed an answer to Kodera's first amended complaint and cross-claimed against United Rentals for contribution, equitable indemnity, express or contractual indemnity, and breach of contract. United Rentals, who had already answered Kodera's complaint, answered the cross-claim denying liability.

Wells Cargo moved for partial summary judgment on its cross-claim for contractual indemnification. It argued that because Kodera's claims were at least in part based on United Rentals' negligent acts, United Rentals had a contractual duty to defend, indemnify, and hold harmless Wells Cargo and Howard Hughes Corporation. Relying on the contract's indemnification provision and the provision adding Wells Cargo to United Rentals' insurance policies, Wells Cargo argued that United Rentals was required to indemnify Wells Cargo and Howard Hughes Corporation even if Wells Cargo itself was found partially liable. United Rentals opposed the motion, arguing that the bump signage was not contemplated in the original indemnification contract, that Wells Cargo failed to demonstrate that United Rentals' conduct caused Kodera's accident, that insurance principles of indemnification did not apply, and that the indemnification provision did not clearly permit Wells Cargo to be indemnified for its own negligence.[2] Wells Cargo replied, arguing that the contract applied to all traffic control, that there was sufficient evidence that United Rentals caused the accident, and that any alleged concurrent negligence by Wells Cargo and Howard Hughes Corporation was immaterial to United Rentals' duties.

The district court ordered United Rentals to indemnify Wells Cargo and Howard Hughes Corporation unless Wells Cargo or Howard Hughes Corporation was determined to be solely negligent. Further, it concluded that United Rentals was ''obligated to defend Wells Cargo and Howard Hughes Corporation [from the date of the first tender] . . . irrespective of any ultimate determination of liability, because the obligation to defend is not outcome driven.'' Thus, it ordered United Rentals to defend Wells Cargo and Howard Hughes Corporation throughout the entire lawsuit. It also ordered United Rentals to hold harmless Wells Cargo and Howard Hughes Corporation.

On the same day the district court entered its order, Wells Cargo, Howard Hughes Corporation, and codefendant the Nevada Department of Transportation (NDOT) again tendered their defenses to United Rentals. These defendants asked United Rentals to indemnify them ''for any damages owed [to Kodera], irrespective

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[2]United Rentals also separately filed a motion for partial summary judgment on Wells Cargo's cross-claim for indemnification, in which United Rentals asserted similar arguments to those made in opposition to Wells Cargo's motion for partial summary judgment. The district court denied the motion.

of allocations of fault and potential findings of sole negligence,'' to assume all of the current and the previous defense costs, and to waive its appellate rights against the tendering defendants. After allegedly not receiving a response from United Rentals, these defendants sought district court approval of a $1,000,000 settlement with Kodera, which was the policy limit of Wells Cargo's primary insurer. United Rentals opposed this motion, arguing that the settlement amount was not made in good faith and that it was grossly disproportionate to the settling defendants' share of damages. After a hearing, the district court granted the motion and permitted Wells Cargo, Howard Hughes Corporation, and NDOT to settle for $1,000,000.[3]

Kodera and United Rentals went to trial, and the jury returned a verdict in favor of United Rentals. Specifically, the jury found United Rentals was negligent, but that its negligence was not the proximate cause of the accident. The district court entered judgment on the jury verdict and awarded United Rentals its associated attorney fees and costs.

Notwithstanding the jury verdict, Wells Cargo filed a motion to enforce indemnification on behalf of the settling defendants, seeking reimbursement of the $1,000,000. It argued that the jury's finding of negligence on the part of United Rentals necessarily meant neither Wells Cargo nor Howard Hughes Corporation could be solely negligent, and thus, United Rentals was required to indemnify Wells Cargo and Howard Hughes Corporation. It also argued that United Rentals was bound by the settlement because it breached its duty to defend. United Rentals opposed the motion and filed another motion for summary judgment on Wells Cargo's cross-claim for indemnification, arguing again that its duties to indemnify and defend were contingent on a finding that the company itself caused Kodera's damages, which contingency was expressly negated by the jury when it found United Rentals' negligence was not the proximate cause of Kodera's injuries.

The district court concluded that because United Rentals knew about the $1,000,000 settlement and had an opportunity to defend against it, Wells Cargo only needed to show that United Rentals was *potentially* liable, and not actually liable, when Wells Cargo tendered its defense. Further, the district court reiterated its prior holding that because the settling defendants ''demonstrated potential liability existed, their defense was seasonably tendered, and [United Rentals] was notified in reasonable fashion of the possibility of settlement and the negotiations,'' United Rentals had a duty to indemnify regardless of the ultimate outcome of the case. The district court's analysis of Wells Cargo's sole liability was lim-

[3]The settling defendants also requested to participate at trial as a condition of the settlement, but the district court denied their request.

ited to an interpretation that proof of same might be evidence to thwart a showing of potential liability, but would not act to relieve United Rentals of indemnification. The district court concluded that United Rentals ''presented no evidence to suggest a lack of [its] potential liability under the contract,'' and thus, the court granted Wells Cargo's motion to enforce indemnification and denied United Rentals' countermotion for summary judgment.

Wells Cargo then filed a motion seeking attorney fees. After the parties briefed the issue and the district court held a hearing on the matter, the district court entered an order awarding Wells Cargo $424,782.87 in attorney fees. The district court subsequently entered an amended judgment in favor of Wells Cargo for $1,000,000 plus interest. United Rentals appealed from the orders and judgment in favor of Wells Cargo.[4]

DISCUSSION

In these appeals, we interpret a contractual indemnification clause limiting the indemnitor's duty to indemnify and defend ''to the extent'' that any injury or damage is ''caused'' by the indemnitor.

The indemnification clause specifically provides that United Rentals shall indemnify Wells Cargo for claims, losses, and damages relating to personal injury or other claims or damages ''to the extent caused in whole or in part by the negligent acts or omissions or other fault of [United Rentals].'' We conclude that the strict construction of this indemnification language prohibits an interpretation that includes indemnity for Wells Cargo without a finding of United Rentals' causation. We further conclude that the district court's error in determining that United Rentals was required to indemnify Wells Cargo resulted in an unfair burden being cast onto a party that the jury found was not at fault. *See George L. Brown Ins. v. Star Ins. Co.*, 126 Nev. 316, 324, 237 P.3d 92, 97 (2010).

Standard of review

[Headnotes 1, 2]

''The interpretation of an indemnity clause within a contract is a question of law, which this court will review de novo.'' *Reyburn Lawn v. Plaster Development Co.*, 127 Nev. 331, 339, 255 P.3d 268, 274 (2011). Additionally, United Rentals challenges the district court's orders granting summary judgment in favor of Wells Cargo and denying its own motion for summary judgment. ''This court reviews a district court's grant of summary judgment de novo, without deference to the findings of the lower court.'' *Wood v. Safeway, Inc.*, 121 Nev. 724, 729, 121 P.3d 1026, 1029 (2005).

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[4]Howard Hughes Corporation is not a party to this appeal.

''Summary judgment is appropriate . . . when the pleadings and other evidence on file demonstrate that no 'genuine issue as to any material fact [remains] and that the moving party is entitled to a judgment as a matter of law.' '' *Id.* (alteration in original) (quoting NRCP 56(c)).

[Headnotes 3, 4]

''Typically, '[c]ontractual indemnity is where, pursuant to a contractual provision, two parties agree that one party will reimburse the other party for liability resulting from the former's work.' '' *Reyburn*, 127 Nev. at 338, 255 P.3d at 274 (alteration in original) (quoting *Medallion Dev. v. Converse Consultants*, 113 Nev. 27, 33, 930 P.2d 115, 119 (1997), *superseded by statute on other grounds as stated in Doctors Company v. Vincent*, 120 Nev. 644, 654, 98 P.3d 681, 688 (2004)). ''When the duty to indemnify arises from contractual language, it generally is not subject to equitable considerations; 'rather it is enforced in accordance with the terms of the contracting parties' agreement.' '' *Id.* (quoting *Prince v. Pacific Gas & Elec. Co.*, 202 P.3d 1115, 1120 (Cal. 2009)).

[Headnote 5]

Accordingly, a provision in a contract purporting to indemnify the indemnitee for the indemnitee's own negligence must be strictly construed. *See id.* at 340, 255 P.3d at 275 (stating this court ''must strictly construe the indemnity clause's language'').

United Rentals' duty to indemnify Wells Cargo is limited to the extent United Rentals caused the damages

[Headnote 6]

As noted, the indemnification clause within the parties' contract provided that United Rentals shall indemnify Wells Cargo for claims, losses, and damages relating to personal injury or other claims or damages ''to the extent caused in whole or in part by the negligent acts or omissions or other fault of [United Rentals].'' United Rentals argues that under a plain reading of this contract language, United Rentals only has an obligation to indemnify Wells Cargo to the extent that it caused the underlying accident and related damages. We agree.

The effect of a ''to the extent caused'' contractual limitation appears to be an issue of first impression in Nevada. However, while the indemnity provision at issue in *Reyburn* was not identically worded to the provision at issue here, the holding in that case strongly suggests that, here, United Rentals' duty to indemnify Wells Cargo is limited to the extent that United Rentals actually caused the injury. 127 Nev. at 340-41, 255 P.3d at 275. Specifically, in *Reyburn*, this court concluded that because the indemnity provision did not explicitly indemnify the indemnitee against

its own negligence, and because this court strictly construed the indemnity clause, ''there must be a showing of negligence on [the indemnitor's] part prior to triggering [the indemnitor's] duty to indemnify [the indemnitee],'' *id.* at 340, and the indemnitee ''may be indemnified only for damages associated with [the indemnitor's] negligence.'' *Id.* at 347-48, 255 P.3d at 279. Limiting United Rentals' duty to indemnify ''to the extent'' that it ''caused'' the accident or injury is also consistent with this court's refusal to '' 'attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations.' '' *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006) (quoting *Senteney v. Fire Ins. Exchange*, 101 Nev. 654, 656, 707 P.2d 1149, 1150-51 (1985)).

Other courts examining contract language virtually identical to the provision at issue here have concluded that limiting a duty to indemnify ''to the extent'' that an injury is ''caused'' by the indemnitor requires a determination of the indemnitor's degree of fault and invokes the duty only to the extent that the indemnitor is negligent. In *Greer v. City of Philadelphia*, the Supreme Court of Pennsylvania interpreted a provision which provided for ''indemnity from claims for damages 'only to the extent caused in whole or in part by negligent acts or omissions of the [indemnitor],' and 'regardless of whether or not such claim . . . [was] caused in part by a party indemnified hereunder.' '' 795 A.2d 376, 379 (Pa. 2002). The court explained that ''the 'to the extent' language . . . [was] in the plain text of the contract and clearly must be given effect.'' *Id.* at 380. Based on that language, that court concluded that the intent of the parties was to limit any indemnification to that portion of damages attributed to the negligence of the indemnitor and held that the indemnitor was not required to provide indemnification due to the negligence of an indemnitee. *Id.* at 379. Further, the court interpreted the provision ''that the indemnity clause [would] apply 'regardless of whether or not such claim . . . [was] caused in part by a party indemnified hereunder' '' as simply a clarification ''that any contributory negligence by [the indemnitees would] not bar their indemnification for damages due to [the indemnitor's] negligence.'' *Id.* at 380. Thus, in construing the entire provision, the Pennsylvania court held that the ''language . . . easily read to only indemnify [the indemnitees] for that portion of damages caused by the negligence of [the indemnitor].'' *Id.* at 381.

The Court of Appeals of Arizona has also interpreted an indemnification provision containing an almost identical ''to the extent caused'' limitation. *MT Builders v. Fisher Roofing*, 197 P.3d 758, 764 (Ariz. Ct. App. 2008). The court there explained that the limiting ''language create[d] what is known as a 'narrow form' of indemnification—the indemnitor's obligation only covers the indemnitee's losses to the extent caused by the indemnitor . . . .'' *Id.*

at 765. As such, the court concluded that ''to obtain indemnity, [the indemnitee] was required to prove the extent of [the indemnitor's] fault.'' *Id*.

Similarly, the Court of Appeals of Minnesota has examined an indemnification provision with a similar limitation. *Braegelmann v. Horizon Development Co.*, 371 N.W.2d 644, 645-46 (Minn. Ct. App. 1985). There, the court explained that the ''to the extent caused'' language ''suggest[ed] a 'comparative negligence' construction under which each party [was] accountable 'to the extent' their negligence contribute[d] to the injury.'' *Id*. at 646. That court also examined the contract language: '' 'regardless of whether it is caused in part by a party indemnified hereunder,' '' and held the equivocal nature of the wording ''fail[ed] under the strict construction standard.'' *Id*. Finally, the court concluded that ''[u]nder the terms of this indemnification clause, the [indemnitee was] not contractually entitled to indemnification from the [indemnitor] to the extent damages were caused by the [indemnitee]'s own negligence.'' *Id*. at 646-47.

As we agree with the rationale of these other courts, we likewise hold that the ''to the extent caused'' language in an indemnification clause must be strictly construed as limiting an indemnitor's liability to cover the indemnitee's losses only to the extent the injuries were caused by the indemnitor. As such, we conclude that this contract's indemnification provision limits United Rentals' duty to indemnify only to the extent that United Rentals caused Kodera's accident. Since the jury found that United Rentals' negligence was not the proximate cause of Kodera's accident, and thus it was zero percent liable for negligence, we conclude that Wells Cargo was entitled to zero indemnification. Thus, the district court erred in determining that United Rentals was required to indemnify Wells Cargo for any portion of the $1,000,000 settlement.[5]

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[5]We reject Wells Cargo's argument that, regardless of fault, the contractual indemnification provision requiring United Rentals to add Wells Cargo as an additional insured on certain liability insurance policies provided a basis for indemnification. Wells Cargo correctly notes that other courts have held that ''when an indemnity agreement contains both hold harmless and insurance provisions, the parties clearly intend that [the indemnitee] will be indemnified against the consequences of its own negligence.'' *Myers v. ANR Pipeline Co.*, 959 F.2d 1443, 1448 (8th Cir. 1992) (alterations in original) (internal quotations omitted) (discussing the law of North Dakota); *see also United Corporation v. Beatty Safway Scaffold Co. of Oregon*, 358 F.2d 470, 478-79 (9th Cir. 1966); *Lafarge North America v. K.E.C.I. Colorado*, 250 P.3d 682, 686 (Colo. App. 2010); *Bridston by Bridston v. Dover Corp.*, 352 N.W.2d 194, 197 (N.D. 1984); *Mikula v. Miller Brewing Co.*, 701 N.W.2d 613, 625 (Wis. Ct. App. 2005). However, the indemnity provisions in these cases do not appear to expressly limit liability ''to the extent'' that any injury, claim or damage is ''caused'' by an indemnitor. *See, e.g.*, *Bridston*, 352 N.W.2d at 196; *Mikula*, 701 N.W.2d at 616. Therefore, the cases cited by Wells Cargo are not controlling because even though United Rentals agreed to hold Wells Cargo

The district court erred in determining that United Rentals was required to defend Wells Cargo and further erred in awarding Wells Cargo attorney fees

[Headnote 7]

Just as with United Rentals' duty to indemnify, the parties' indemnification provision limited United Rentals' duty to defend Wells Cargo against claims, losses, and damages relating to personal injury or other claims or damages ''to the extent caused in whole or in part by the negligent acts or omissions or other fault of [United Rentals].'' Notwithstanding the ''to the extent caused'' limitation, the district court held that United Rentals had a duty to defend Wells Cargo from the date of Wells Cargo's first tender of defense, regardless of the ultimate outcome. United Rentals argues that the district court erred in imposing a duty to defend because the contractual language limits its duty to defend to circumstances where United Rentals caused the injury and that until such causation is shown, there is no duty under the contract. According to United Rentals, ''[t]o hold otherwise would force [it] to incur attorney[ ] fees in defense of claims it may not have caused, which is contrary to the express language.'' Based on a plain reading of the contract language, we agree.

[Headnotes 8-10]

''An indemnity clause imposing a duty to defend is construed under the same rules that govern other contracts.'' *Reyburn*, 127 Nev. at 344, 255 P.3d at 277. '' 'The duty to defend is broader than the duty to indemnify' because it covers not just claims under which the indemnitor is liable, but also claims under which the indemnitor could be found liable.'' *Id.* (quoting *United Nat'l Ins. Co. v. Frontier Ins. Co.*, 120 Nev. 678, 686, 99 P.3d 1153, 1158 (2004)). Generally, ''[a] contractual promise to 'defend' another against specified claims clearly connotes an obligation of active responsibility, *from the outset*, for the promisee's defense against such claims.'' *Crawford v. Weather Shield Mfg. Inc.*, 187 P.3d 424, 431 (Cal. 2008), *discussed with approval in Reyburn*, 127 Nev. at 344-45, 255 P.3d at 277-78.

[Headnotes 11-14]

However, while the duty to defend is broad, it is not limitless. Unlike an insurance agreement, which typically requires an insurer

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harmless and to name Wells Cargo as an insured on certain liability insurance policies that it procured, the contractual language explicitly limits United Rentals' obligation to the extent it caused any injury or damage. As such, we conclude that the addition of Wells Cargo to the insurance policies does not expand United Rentals' duty beyond the specifically construed contract language.

to defend all claims against the insured regardless of the claim's merit, *see Thibodaux v. Southern Natural Gas Co.*, 705 So. 2d 1287, 1289 (La. Ct. App. 1998), the duty to defend outlined in an indemnification provision is subject to strict construction of the contract language. *Prince v. Pacific Gas & Elec. Co.*, 202 P.3d 1115, 1120 (Cal. 2009) (''In the context of noninsurance indemnity agreements, if a party seeks to be indemnified for its own active negligence, *or regardless of the indemnitor's fault*, the contractual language on the point must be particularly clear and explicit, and will be construed strictly against the indemnitee.'' (internal quotations omitted)); *Crawford*, 187 P.3d at 430 (''Though indemnity agreements resemble liability insurance policies, rules for interpreting the two classes of contracts do differ significantly.''); *Reyburn*, 127 Nev. at 344, 255 P.3d at 277 (contrasting ''an insurer's duty to defend under an insurance policy'' with ''the duty to defend arising from an indemnity clause''). While ''[a]mbiguities in a policy of insurance are construed against the insurer'' because the insurer might be in a superior bargaining position to the insured, ''[i]n noninsurance contexts, . . . it is the *indemnitee* who may often have superior bargaining power, and who may use this power unfairly to shift to another a disproportionate share of the financial consequences of its own legal fault.'' *Crawford*, 187 P.3d at 430. Accordingly, ''unless specifically otherwise stated in the indemnity clause, an indemnitor's duty to defend an indemnitee is limited to those claims directly attributed to the indemnitor's scope of work and does not include defending against claims arising from . . . the indemnitee's own negligence.'' *Reyburn*, 127 Nev. at 345, 255 P.3d at 278.

[Headnotes 15, 16]

Furthermore, as noted previously in this opinion, this court will not '' 'attempt to increase the legal obligations of the parties where the parties intentionally limited such obligations.' '' *Griffin v. Old Republic Ins. Co.*, 122 Nev. 479, 483, 133 P.3d 251, 254 (2006) (quoting *Senteney v. Fire Ins. Exchange*, 101 Nev. 654, 656, 707 P.2d 1149, 1150 (1985)). Additionally, ''[e]very word [in a contract] must be given effect if at all possible.'' *Royal Indem. Co. v. Special Serv.*, 82 Nev. 148, 150, 413 P.2d 500, 502 (1966); *Ellison v. C.S.A.A.*, 106 Nev. 601, 603, 797 P.2d 975, 977 (1990) (''[A]bsent some countervailing reason, contracts will be construed from the written language and enforced as written.''). Here, there is no clear and explicit language in the contract that directs United Rentals to defend Wells Cargo in claims where its own negligence is asserted. When the contractual language that does exist is strictly construed, United Rentals' duty to defend Wells Cargo is limited ''to the extent'' that United Rentals' ''caused'' Kodera's

accident.[6] Thus, because the jury found that United Rentals' negligence was not the proximate cause of Kodera's accident, United Rentals did not have a duty to defend Wells Cargo.[7]

In addition to seeking the recoupment of the $1 million it spent to settle Kodera's claims against it, Wells Cargo sought defense costs and attorney fees. However, as the plain language of the contract places no duty on United Rentals to defend Wells Cargo against its own negligence, and the duty to defend was limited to the extent that United Rentals was negligent, the district court erroneously awarded Wells Cargo most of its defense costs and attorney fees.[8] *See Reyburn*, 127 Nev. at 345, 255 P.3d at 279 (limiting the indemnitor's duty to pay defense costs to ''those claims directly attributed to the indemnitor's scope of work''); *cf. Crawford*, 187 P.3d at 432 (explaining that with certain limitations, ''[w]here the indemnitor has breached [its] obligation [to defend], an indemnitee who was thereby forced, against its wishes, to defend itself is entitled to reimbursement of the costs of doing so'').

For the reasons discussed above, we reverse the judgment of the district court.[9]

SAITTA and PICKERING, JJ., concur.

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[6]Wells Cargo points to a phrase in the indemnification provision that says the indemnitor must defend against claims ''pertaining or allegedly pertaining to'' the performance of the contract, and asks this court to interpret the meaning of this clause as extending the duty to defend to acts where United Rentals could have been negligent, even if it were not proven to be negligent. To the extent that this phrase contradicts the causal limitation, it is ambiguous, and therefore interpreted against Wells Cargo, who drafted the contract. *See Anvui, LLC v. G.L. Dragon, LLC*, 123 Nev. 212, 215-16, 163 P.3d 405, 407 (2007).

[7]Wells Cargo argues that because United Rentals breached its duty to defend, it is entitled to indemnity regardless of fault. Specifically, Wells Cargo argues that regardless of the jury's verdict, Wells Cargo need only show that United Rentals was *potentially* liable because (1) an enforceable contract for defense and immunity exists, (2) a seasonable tender of defense was made with notice a settlement will be entered, and (3) the tender of defense was refused by United Rentals. Because we hold that United Rentals did not have a duty to defend Wells Cargo, we need not address the alleged breach of the duty.

[8]Accordingly, we need not address the parties' arguments concerning whether the district court must apportion the amount of attorney fees and defense costs that United Rentals owes Wells Cargo.

[9]Wells Cargo argues that the contract ''requires United Rentals to hold Wells Cargo harmless, a contractual obligation that United Rentals never opposed, and now these words must be given effect.'' We conclude that the ''hold harmless'' requirement is subject to the same ''to the extent caused'' limitation as United Rentals' other duties, and United Rentals is thus not required to hold Wells Cargo harmless. *See Public Service Co. v. United Cable*, 829 P.2d 1280, 1283 (Colo. 1992) (stating that ''indemnity contracts holding indemnitees harmless for their own negligent acts must contain clear and unequivocal language to that effect'' (internal quotations omitted)).

MICHAEL H. GRISHAM, APPELLANT, *v.* SUSIE L. GRISHAM; AND ANITA WEBSTER, RESPONDENTS.

No. 55394

MICHAEL H. GRISHAM, APPELLANT, *v.* SUSIE L. GRISHAM, RESPONDENT.

No. 57433

December 6, 2012 289 P.3d 230

Consolidated appeals from a district court divorce decree and a judgment adjudicating an attorney's lien. Eighth Judicial District Court, Family Court Division, Clark County; Frank P. Sullivan and Jennifer Elliott, Judges.

Wife filed motion for entry of divorce decree based on parties' marked-up property settlement agreement (PSA) that had previously been read into the record with stipulation that a clean copy, signed by both parties, would be submitted to the court. Husband, who refused to sign the clean copy, appeared at hearing on wife's motion and orally opposed it. The district court granted motion and entered divorce decree based on the PSA that never was signed by husband. Husband appealed. The supreme court, PICKERING, J., held that: (1) parties' open-court stipulation to handwritten PSA was sufficient to render it enforceable even without husband's signature, and (2) PSA was enforceable even though parties had agreed to present a ''clean copy'' to the district court at a later time.

Affirmed.

Robert W. Lueck, Esq., Las Vegas, for Appellant.

Smith & Taylor and *Radford J. Smith*, Henderson, for Respondent Susie L. Grisham.

Webster & Associates, Las Vegas, for Respondent Anita A. Webster.

1. COMPROMISE AND SETTLEMENT.
   An agreement to settle pending litigation can be enforced by motion in the case being settled if the agreement is either reduced to a signed writing or entered in the court minutes following a stipulation. DCR 16.
2. DIVORCE.
   Rule governing conditions under which a court may, on motion, enforce an agreement to settle pending litigation applies to divorce and dissolution disputes equally with any other kind of civil litigation. DCR 16.
3. COMPROMISE AND SETTLEMENT.
   Rule governing conditions under which a court may, on motion, enforce an agreement to settle pending litigation gives the court an efficient method for determining genuine settlements and enforcing them. DCR 16.

4. COMPROMISE AND SETTLEMENT.
   Rule recognizing the district court's authority to enforce an agreement to settle pending litigation does not thwart the policy in favor of settling disputes; instead, it enhances the reliability of actual settlements. DCR 16.
5. COMPROMISE AND SETTLEMENT.
   The formality, publicity, and solemnity of an open court proceeding protects parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle.
6. COMPROMISE AND SETTLEMENT.
   Placing a settlement agreement on the record in open court ensures that there is a formal record to memorialize the critical litigation events and, modernly, a transcript beyond dispute and the fallibility of memory.
7. FRAUDS, STATUTE OF.
   A stipulated judgment made in open court is not within the statute of frauds even though its subject matter is real property.
8. COMPROMISE AND SETTLEMENT.
   When parties to pending litigation enter into a settlement, they enter into a contract that is subject to general principles of contract law.
9. COMPROMISE AND SETTLEMENT.
   In addition to complying with procedural requirements of rule governing conditions under which a court may, on motion, enforce an agreement to settle pending litigation, a stipulated settlement agreement requires mutual assent or a meeting of the minds on the contract's essential terms.
10. CONTRACTS.
    A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite for a court to ascertain what is required of the respective parties and to compel compliance if necessary.
11. DIVORCE.
    Parties' oral open-court stipulation to their property settlement agreement (PSA) satisfied rule governing conditions under which a court may, on motion, enforce an agreement to settle pending litigation such that the district court could later enter divorce decree incorporating the PSA even without husband's signature; husband acknowledged, under oath, the PSA's key terms, that he had reviewed it, and that he agreed to its terms, and court minutes stated, ''COURT ORDERED, absolute DECREE OF DIVORCE is GRANTED pursuant to the terms and conditions as outlined in the proposed Property Settlement Agreement, marked and admitted as Exhibit A, and lodged in the left hand side of the file.'' DCR 16.
12. APPEAL AND ERROR.
    Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review.
13. COMPROMISE AND SETTLEMENT; FRAUDS, STATUTE OF.
    Compliance with rule governing conditions under which a court may, on motion, enforce an agreement to settle pending litigation removes the agreement from the purview of the statute of frauds; while recorded testimony has no signature, a signature's only purpose is authentication, and this is amply supplied in the case of an admission in court. DCR 16.
14. DIVORCE.
    That the parties expressed an intention to prepare and adopt a ''clean copy'' of their handwritten property settlement agreement (PSA) and

present it to the court at a later time, signed by both parties, did not render the PSA as read into the record in open court unenforceable in divorce proceeding; husband's testimony and the statements of his lawyer at the hearing on the PSA expressed an assent to be currently bound, and the clean copy to follow was just that, a clean execution copy, to be attached to the final decree.

15. APPEAL AND ERROR.
Whether the parties have described their essential obligations in sufficiently definite and certain terms to create an enforceable contract presents a question of law that an appellate court reviews de novo.

16. APPEAL AND ERROR.
Whether a contract exists generally presents a question of fact, requiring the supreme court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence; contract interpretation, by contrast, draws de novo review.

17. STIPULATIONS.
A district judge may relieve a party of a stipulation upon a showing that it was entered into through mistake, fraud, collusion, accident, or some other ground of like nature, but this is a determination generally left to the discretion of the trial court. NRCP 59, 60(b).

Before SAITTA, PICKERING and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

This appeal challenges a final divorce decree based on a written but unsigned property settlement agreement. The district court incorporated the agreement into its decree based on the parties' testimony, in open court, that they stipulated to its terms. The district court admitted the draft as a hearing exhibit and approved the oral stipulation by minute order. This procedure complied with applicable district court rules, which obviates any issue as to the statute of frauds, and the draft otherwise met the requirements for an enforceable contract. We affirm.

I.

The morning of the first day of trial, the parties appeared with their lawyers to advise that they had settled. They had negotiated based on a draft property settlement agreement (PSA). The final draft contained some last-minute handwritten changes, and the lawyers had not had time to prepare a clean execution copy. They asked to put the settlement on the record and to proceed with an uncontested divorce prove-up hearing. This would leave undone only the ministerial tasks of preparing and signing a clean copy of the PSA and entering the final decree.

Both appellant Michael Grisham and respondent Susie Grisham testified at the hearing, as did a third-party witness to Susie's Nevada residency. Most of the discussion and testimony focused on

the PSA, which was admitted as Exhibit A. The lawyers read into the record the few handwritten notations on the draft and stipulated that the PSA, with its handwritten changes, would ''be binding on the parties today'':

> Your Honor, what our intention is with regard to Exhibit A is, like I say, there's some interlineations. What we'd like to do is have the terms entered as an exhibit and be binding on the parties today. Then what we'd like to do is to provide a clean copy, which will be fully executed by the parties again today, and then submit all of that by way of a decree of divorce.

Under questioning, first by his lawyer then by Susie's, Michael testified that he had reviewed, understood, and agreed to the PSA. He acknowledged its principal terms. He also confirmed that he recognized he would be bound by the PSA. Susie testified to similar effect as Michael.

At the end of the hearing, the court orally accepted the settlement. The hearing minutes give the following recap:

> Plaintiff, Defendant and [the] resident witness, sworn and testified. COURT ORDERED, absolute DECREE OF DIVORCE is GRANTED pursuant to the terms and conditions as outlined in the proposed Property Settlement Agreement, marked and admitted as Exhibit A, and lodged in the left hand side of the file.

Michael's lawyer generated a clean copy of the PSA, which Susie and her lawyer signed and returned. Michael did not sign, first asking for minor revisions, then not answering his lawyer's letters and calls. Eventually, Michael's lawyer, his fourth, withdrew, asserting an attorney's lien, which the district court reduced to judgment.

After several months with no case progress, Susie moved for entry of a divorce decree based on the PSA. Representing himself, Michael did not file a written opposition to Susie's motion but moved for a mistrial. Although Michael refused to sign the PSA, Susie argued that the district court could enforce the PSA based on the prove-up hearing transcript and minute order. After further proceedings, including a hearing at which Michael appeared and orally opposed Susie's motion, the district court entered a final written decree incorporating the PSA. It also denied Michael's motion for mistrial.

Michael appeals both the decree incorporating the PSA and the judgment adjudicating the attorney's lien.[1]

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[1]Michael filed his appeal in proper person. He retained appellate counsel after this court entered an order requesting supplemental briefs.

II.

A.

[Headnote 1]

District Court Rule 16 defines the conditions under which a court may, on motion, enforce an agreement to settle pending litigation. Its language is somewhat oblique:

> No agreement or stipulation between the parties in a cause or their attorneys, in respect to proceedings therein, will be regarded unless the same shall, by consent, be entered in the minutes in the form of an order, or unless the same shall be in writing subscribed by the party against whom the same shall be alleged, or by his attorney.

See also EDCR 7.50 (replicating DCR 16 with minor revisions). Despite its awkward wording, DCR 16's application is straightforward: An agreement to settle pending litigation can be enforced by motion in the case being settled if the agreement is ''either . . . reduced to a signed writing or . . . entered in the court minutes following a stipulation.'' *Resnick v. Valente*, 97 Nev. 615, 616, 637 P.2d 1205, 1206 (1981) (applying DCR 24, later renumbered DCR 16).

[Headnotes 2-4]

DCR 16 applies to divorce and dissolution disputes equally with any other kind of civil litigation. *See Grenz v. Grenz*, 78 Nev. 394, 399, 374 P.2d 891, 894 (1962) (interpreting DCR 16's predecessor). The rule gives ''the court . . . an efficient method for determining genuine settlements and enforcing them.'' *Resnick*, 97 Nev. at 616, 637 P.2d at 1206. It ''does not thwart the policy in favor of settling disputes; instead, it enhances the reliability of actual settlements.'' *Id.* at 616-17, 637 P.2d at 1206.

[Headnotes 5, 6]

Courts elsewhere, by statute, court rule, or common law, similarly enforce oral settlement agreements—even agreements otherwise subject to the writing requirement of a statute of frauds—if put on the record and approved in open court. *See In re Marriage of Assemi*, 872 P.2d 1190, 1195 (Cal. 1994) (applying Cal. Civ. Proc. Code § 664.6); *In re Dolgin Eldert Corporation*, 286 N.E.2d 228, 232 (N.Y. 1972) (applying N.Y. C.P.L.R. 2104); *Matter of Estate of Eberle*, 505 N.W.2d 767, 770 (S.D. 1993) (''Oral stipulations of the parties in the presence of the court are generally held to be binding, especially when acted upon or entered on the court record . . . .''). A ''traditionally favored device'' for fostering authentic and reliably recorded settlements, *Rubenfeld v. Rubenfeld*, 720 N.Y.S.2d 29, 32 (App. Div. 2001), the procedure

dates back at least to the nineteenth century. Thus, writing in 1889, Justice Oliver Wendell Holmes repelled a statute of frauds challenge to a stipulated oral agreement, stating simply: ''It is a sufficient answer to this proposition that the statute [requiring a signed writing] plainly is not intended to apply to an agreement like the present, made in open court, and acted on by the court.'' *Savage v. Blanchard*, 19 N.E. 396, 396 (Mass. 1889). ''[T]he formality, publicity, and solemnity of an open court proceeding,'' *Dolgin Eldert Corporation*, 286 N.E.2d at 233, protects ''parties against hasty and improvident settlement agreements by impressing upon them the seriousness and finality of the decision to settle.'' *Assemi*, 872 P.2d at 1208 (Kennard, J., dissenting). In addition, placing the agreement on the record in open court ensures that there is a formal record ''to memorialize the critical litigation events [and, modernly,] a transcript beyond dispute and the fallibility of memory.'' *Dolgin Eldert Corporation*, 286 N.E.2d at 233; *see Haley v. Eureka Co. Bank*, 20 Nev. 410, 421-22, p. 1098, 1101 (1889).

[Headnote 7]

The PSA included promises affecting interests in land, making it arguably subject to one or more Nevada statutes of frauds.[2] Michael's refusal to sign the PSA does not trigger the statute of

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[2]*See* NRS 111.205(1) (requiring a properly executed instrument to convey an interest in land); *compare Schreiber v. Schreiber*, 99 Nev. 453, 455, 663 P.2d 1189, 1190 (1983) (accepting appellant's statement that ''a property settlement agreement is required to be in writing'' (citing NRS 123.220)), *with Anderson v. Anderson*, 107 Nev. 570, 573 n.1, 816 P.2d 463, 465 n.1 (1991) (SPRINGER, J., concurring) (criticizing *Schreiber*'s ''misleading dicta''). We also noted and requested supplemental briefing in this case on NRS 123.270, which provides that ''[a]ll marriage contracts or settlements must be in writing, and executed and acknowledged or proved in like manner as a conveyance of land is required to be executed and acknowledged or proved.'' *See also* NRS 123A.040 (requiring a premarital agreement to be written and signed but not requiring acknowledgment). Unchanged since its enactment in 1873, 1 Nev. Compiled Laws § 176 (1873), NRS 123.270's reference to ''marriage settlement'' historically signified ''[t]he conveyance of an estate . . . made on the prospect of marriage, for the benefit of the married pair, or one of them, or for the benefit of some other person, as their children,'' 2 *Bouvier's Law Dictionary* 519 (11th ed. 1864), ''in contemplation of marriage.'' *Id.* at 111; *cf. Occhiuto v. Occhiuto*, 97 Nev. 143, 147, 625 P.2d 568, 570 (1981) (NRS 123.270 did not apply absent ''allegations that an[act] was either done or withheld in contemplation of marriage''). Whether comparable statutes apply to settlements in contemplation of divorce, as opposed to marriage is unsettled. *Stevens v. Stevens*, 16 P.3d 900, 904 (Idaho 2000) (statute applies equally to contracts in contemplation of divorce as to marriage); *contra Fox v. Fox*, 731 S.E.2d 676, 678 (Ga. 2012). We do not resolve the issue here because even states that apply their version of NRS 123.270 to contracts entered into in contemplation of divorce recognize that such statutes do not apply to the longstanding ''practice of taking oral stipulations in open court in divorce cases.'' *Stevens*, 16 P.3d at 905.

frauds, though, so long as the in-court proceedings respecting the PSA satisfy DCR 16. ''A stipulated judgment made in open court is not within the statute of frauds even though its subject matter [is] real property.'' *Eberle*, 505 N.W.2d at 771. *Accord Powell v. Omnicom*, 497 F.3d 124, 129 n.2 (2d Cir. 2007) (''[T]he requirement that the settlement be on the record and in open court serves as a limited exception to the Statute of Frauds.''); *Sparaco v. Tenney*, 399 A.2d 1261, 1262 (Conn. 1978) (''A stipulated judgment made in open court is not within the Statute of Frauds, . . . even though its subject matter was real property.''); *Kalman v. Bertacchi*, 373 N.E.2d 550, 556 (Ill. App. Ct. 1978) (''It is not the intention of the Statute of Frauds to affect stipulations made in a court and subject to the court's supervision and control[; t]he purpose of the Statute is not forsaken in view of the fact that proof of the existence of an agreement is a matter of court record and cannot be disputed.''); *Dolgin Eldert Corporation*, 286 N.E.2d at 232 (historically, ''[t]he rule had always been that oral stipulations or concessions made in open court, despite statutory or rule requirements for writings, would be enforced over the objection of lack of a subscribed writing''); *Thomas v. Thomas*, 449 N.E.2d 478, 484 (Ohio Ct. App. 1982) (''[T]he Statute of Frauds has no application to an 'in-court' settlement stipulation . . . .'').

B.

[Headnotes 8-10]

The question then is: Did the in-court proceedings establish the PSA as an enforceable settlement agreement under DCR 16? When parties to pending litigation enter into a settlement, they enter into a contract. *Mack v. Estate of Mack*, 125 Nev. 80, 95, 206 P.3d 98, 108 (2009). Such a contract is subject to general principles of contract law. *Id*.[3] In addition to complying with DCR 16's procedural requirements, a stipulated settlement agreement requires mutual assent, *see Lehrer McGovern Bovis v. Bullock Insulation*, 124 Nev. 1102, 1118, 197 P.3d 1032, 1042 (2008), or a ''meeting of the minds,'' *May v. Anderson*, 121 Nev. 668, 672, 119 P.3d 1254, 1257 (2005), on ''the contract's essential terms.'' *Certified Fire Prot. v. Precision Constr.*, 128 Nev. 371, 378, 283 P.3d 250, 255 (2012). ''A valid contract cannot exist when material terms are lacking or are insufficiently certain and definite'' for a court ''to ascertain what is required of the respective parties'' and to ''compel compliance'' if necessary. *May*, 121 Nev. at 672, 119 P.3d at 1257; *accord Eberle*, 505 N.W.2d at 770.

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[3]Although *Mack* suggests in dictum that consideration is required to enforce an in-court settlement agreement, 125 Nev. at 95, 206 P.3d at 108, this is contrary to the Restatement (Second) of Contracts § 94 (1981), which states: ''A promise or agreement with reference to a pending judicial proceeding, made by a party to the proceeding or his attorney, is binding without consideration.''

1.

[Headnotes 11, 12]

Michael argues, first, that the proceedings before the district court did not comply with DCR 16. He complains that the parties did not read the entire 20+ page PSA out loud into the record but instead made the PSA a hearing exhibit, covering orally only its principal terms and interlineated changes. Relatedly, he argues that the minutes recording the court's oral decision to grant a divorce based on the PSA were insufficiently specific. ''Given that the power to implement a settlement agreement between the parties inheres in the district court's role as supervisor of the litigation, the exercise of that power is particularly appropriate for deferential review.'' *Carr v. Runyan*, 89 F.3d 327, 331 (7th Cir. 1996). We therefore review the district court's decision to proceed as it did for an abuse of discretion, *id.*, and find none.

[Headnote 13]

Although compliance with DCR 16 removes the PSA from the purview of the statute of frauds, it is significant in determining whether DCR 16 was satisfied that Michael's testimony fulfilled the purposes of a statute of frauds. ''While recorded testimony has no signature, a signature's only purpose is authentication, and this is amply supplied in the case of an admission in court.'' *Kalman*, 373 N.E.2d at 556. The hearing transcript establishes that Michael acknowledged, under oath, the PSA's key terms, that he had reviewed it, and that he agreed to its terms. The fact that this testimony, sufficient to satisfy any arguably applicable statute of frauds, in turn incorporated by specific reference a longer unsigned writing does not undermine its effectiveness. *See* 10 Richard A. Lord, *Williston on Contracts* § 29:29 (West 2012) (''The writing, in order to have a memorandum to satisfy the Statute of Frauds need not be contained in any one paper, but may include unsigned writings . . . united by content or reference, and even, in a proper framework, united by parol evidence.'' (quoting *Papaioannou v. Britz*, 139 N.Y.S.2d 658, 662 (App. Div. 1955))). Someday, a case may come where an in-court proceeding is so truncated by reliance on ignored exhibits as to defeat DCR 16's cautionary purpose, but this is not that case. *See Perryman v. Perryman*, 117 S.W.3d 681, 686 (Mo. Ct. App. 2003) (testimony establishing that a ''Memorandum of Agreement' and its attached exhibits outlined all of the terms of the[parties'] agreement and that they each understood the agreement's terms, accepted its terms and agreed to be bound by [them]'' made the oral settlement agreement, incorporating the written draft, ''sufficiently spread upon the record [to be] enforceable'').

Nor do we credit Michael's argument that the court minutes incorporating the PSA failed to satisfy DCR 16. *Casentini v. Hines*,

97 Nev. 186, 625 P.2d 1174 (1981), is inapposite. In *Casentini*, the parties' oral stipulation was recorded in the hearing transcript but ''the stipulation was not made the subject of a minute order.'' *Id.* at 187, 625 P.2d at 1175. Instead, the district court orally directed the parties to prepare and submit a written stipulation. *Id.* at 186, 625 P.2d at 1175. The stipulation in *Casentini* thus was not ''by consent . . . entered in the minutes in the form of an order.'' DCR 16 (then numbered DCR 24). The opposite occurred here, where minutes exist and state: ''COURT ORDERED, absolute DECREE OF DIVORCE is GRANTED pursuant to the terms and conditions as outlined in the proposed Property Settlement Agreement, marked and admitted as Exhibit A, and lodged in the left hand side of the file.''

This case is closer to *Grenz v. Grenz*, 78 Nev. 394, 374 P.2d 891 (1962), than *Casentini*. In *Grenz*, this court upheld a district court order enforcing a settlement agreement in a divorce matter as compliant with DCR 24, the predecessor to DCR 16. *Grenz*, 78 Nev. at 399, 374 P.2d at 894. The district judge summarized what he understood the agreement to be on the record, and it ''was entered in the minutes with no objection.'' *Id.* ''No correction was made by either party as directed by the court in the event the trial judge did not state the agreement accurately.'' *Id.* We concluded, ''[a]n implied consent that the agreement be entered in the minutes was apparent.'' *Id.*

2.

[Headnotes 14-16]

Michael next argues that no contract was formed and that, if one was, it was unconscionable and should not be enforced. Whether the parties have ''described their 'essential obligations' in [sufficiently] definite and certain terms'' to create an enforceable contract presents a question of law that an appellate court reviews de novo. *Cogswell v. Citifinancial Mortg. Co., Inc.*, 624 F.3d 395, 398 (7th Cir. 2010). With this exception, whether a contract exists generally presents a question '' 'of fact, requiring this court to defer to the district court's findings unless they are clearly erroneous or not based on substantial evidence.' '' *Mack*, 125 Nev. at 95, 206 P.3d at 108 (quoting *May*, 121 Nev. at 672-73, 119 P.3d at 1257). Contract interpretation, by contrast, draws de novo review. *Id.*

To the extent Michael argues that the parties' announced intention of preparing a final written agreement defeats mutual assent to the PSA as immediately binding, his argument fails. ''Manifestations of assent that are in themselves sufficient to conclude a contract will not be prevented from so operating by the fact that the parties also manifest an intention to prepare and adopt a written memorial thereof; but the circumstances may show that the agree-

ments are preliminary negotiations.'' Restatement (Second) of Contracts § 27 (1965); *see Dolge v. Masek*, 70 Nev. 314, 268 P.2d 919 (1954). Although Michael has since changed his position, his testimony and the statements of his lawyer at the hearing on the PSA expressed an assent to be currently bound. The clean copy to follow was just that: A clean execution copy, to be attached to the final decree. The district court did not clearly err when it enforced the PSA based on the transcript of the proceedings in open court.

[Headnote 17]

Michael points to differences between the final PSA and the prove-up hearing version of it to establish the latter as preliminary and incomplete. To the extent the differences are due to the final version's incorporation of the handwritten changes noted at the prove-up hearing, this argument is a nonstarter. Michael does not identify any other changes of consequence. While he now argues that he disagreed with some of the terms as written, he testified without reservation at the prove-up hearing that he had reviewed and agreed with those terms. *Cf. Aldabe v. Adams*, 81 Nev. 280, 284-85, 402 P.2d 34, 36-37 (1965) (refusing to credit a sworn statement made in opposition to summary judgment that was in direct conflict with an earlier sworn statement of the same party), *overruled on other grounds by Siragusa v. Brown*, 114 Nev. 1384, 1393, 971 P.2d 801, 807 (1998). A district judge may relieve a party of a stipulation ''upon a showing that it was entered into through mistake, fraud, collusion, accident or some other ground of like nature,'' but this is a determination ''generally left to the discretion of the trial court.'' *Citicorp Services v. Lee*, 99 Nev. 511, 513, 665 P.2d 265, 266-67 (1983); *see* NRCP 59, 60(b) (specifying bases for relief from judgment). On the record presented, the district court did not abuse its discretion in declining to relieve Michael of his obligations under the PSA.

III.

Michael's remaining claims of error fail. As for the attorney's lien appeal, *Argentena Consolidated Mining Co. v. Jolley Urga*, 125 Nev. 527, 539, 216 P.3d 779, 787 (2009), recognizes consent as a basis for the district court's exercise of ancillary jurisdiction over an attorney's lien. The record establishes a basis for implied consent.

We therefore affirm.

SAITTA and HARDESTY, JJ., concur.

ARTHUR EINHORN, APPELLANT, *v.*
BAC HOME LOANS SERVICING, LP, RESPONDENT.

No. 57875

December 6, 2012 290 P.3d 249

Appeal from a district court order denying sanctions for alleged violations of the foreclosure mediation statute and rules. Eighth Judicial District Court, Clark County; Donald M. Mosley, Judge.

Mortgagor petitioned for judicial review after proceedings brought under Foreclosure Mediation Program failed to result in modification and sought imposition of sanctions against beneficiary of mortgagee's assignee. The district court denied petition and issued letter of certification. Mortgagor appealed. The supreme court, PICKERING, J., held that: (1) beneficiary did not bring to foreclosure mediation all documents required to show that it was proper entity to proceed against mortgagor; (2) beneficiary showed that it was entity entitled to enforce note and deed of trust; and (3) that mortgagor, rather than beneficiary, supplied omitted information that complied with statute requiring that ''beneficiary shall bring [required documentation] to the mediation.''

Affirmed.

Crosby & Associates and *David M. Crosby* and *Troy S. Fox*, Las Vegas, for Appellant.

Akerman Senterfitt, LLP, and *Ariel E. Stern, Heidi Parry Stern*, and *Shannon M. Gallo*, Las Vegas, for Respondent.

1. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   If a Nevada homeowner elects foreclosure mediation, a nonjudicial foreclosure on an owner-occupied residence cannot proceed without a foreclosure mediation program certificate that mediation has concluded or been waived. NRS 107.086.
2. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   The goal of the foreclosure mediation program is to bring the trust-deed beneficiary and the homeowner together to participate in a meaningful negotiation, and to that end, the statute obligates the trust-deed beneficiary or its representative to (1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; and (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person. NRS 107.086(4), (5).
3. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   Beneficiary of mortgagee's assignee did not bring to foreclosure mediation all documents required to show that it was proper entity to proceed against mortgagor, under foreclosure mediation program, where beneficiary's documents omitted document showing how assignee obtained rights to enforce note and deed of trust and, therefore, failed to show that assignee had authority to transfer note and deed of trust. NRS 107.086(4), 111.205(1).

4. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   Having a certified copy of the deed of trust, the mortgage note, and each assignment of the deed of trust or mortgage available at the foreclosure mediation allows the mediator and the homeowner to satisfy themselves that whoever is foreclosing actually owns the note and has authority to modify the loan, and further, that the party seeking the foreclosure mediation program certificate is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property. NRS 107.086(4).
5. MORTGAGES.
   A district court's factual findings in the foreclosure mediation program setting receive the same appellate deference as in other settings and will be upheld if not clearly erroneous and if supported by substantial evidence.
6. APPEAL AND ERROR.
   A party may not raise new issues on appeal, factual and legal, that were not presented to the district court that neither the opposing party nor the district court had the opportunity to address.
7. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   Beneficiary of mortgagee's assignee showed that it was entity entitled to enforce note and deed of trust, as required to proceed under foreclosure mediation program, despite beneficiary's failure to produce document showing that assignee had authority to enforce note, where mortgagor's attorney obtained copy of missing assignment from mortgagee to assignee. NRS 104.3301, 107.086(4).
8. ALTERNATIVE DISPUTE RESOLUTION; MORTGAGES.
   That mortgagor, rather than beneficiary of mortgagee's assignee, supplied documentation of assignment from mortgagor to assignee, which documentation showed that assignee was proper entity with authority to enforce note and deed of trust, and to transfer same, complied with statute requiring that ''beneficiary shall bring [required documentation] to the mediation,'' since question as to which party produced all required documentation was simply matter of form. NRS 107.086(4).
9. STATUTES.
   A court's requirement for strict or substantial compliance with a statute may vary depending on the specific circumstances.
10. STATUTES; TIME.
    In general, time and manner requirements are strictly construed, whereas substantial compliance may be sufficient for form and content requirements.
11. STATUTES.
    Strict compliance with a statute does not mean absurd compliance.

Before GIBBONS, PICKERING and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

This appeal arises out of the Nevada Foreclosure Mediation Program (FMP). When mediation did not produce a loan modification, appellant Arthur Einhorn filed a petition for judicial review in district court. The petition asked for sanctions against respondent BAC Home Loans Servicing, LP (BAC), alleging that BAC

failed to comply with the FMP's document production and good faith requirements. *See* NRS 107.086(4). After briefing and argument, the district court rejected Einhorn's petition. It found ''no irregularity as to the submitted documents''; that BAC ''has met [its] burden of showing a lack of bad faith''; and ordered that, ''absent a timely appeal, a Letter of Certification will issue.'' We affirm.

I.

[Headnotes 1, 2]

If a Nevada homeowner elects FMP mediation, as Einhorn did, a non-judicial foreclosure on an owner-occupied residence cannot proceed without an FMP certificate that mediation has concluded or been waived. *Holt v. Regional Trustee Services Corp.*, 127 Nev. 886, 888, 266 P.3d 602, 603 (2011). The goal is to bring the trust-deed beneficiary and the homeowner together to participate in a meaningful negotiation. *Id.* at 893, 266 P.3d at 607. To that end, the statute obligates the trust-deed beneficiary (or its representative) to ''(1) attend the mediation; (2) mediate in good faith; (3) provide the required documents; [and] (4) if attending through a representative, have a person present with authority to modify the loan or access to such a person.'' *Pasillas v. HSBC Bank USA*, 127 Nev. 462, 466, 255 P.3d 1281, 1284 (2011) (citing NRS 107.086(4) and (5) and FMR 5(7)(a)).

A.

[Headnotes 3, 4]

This appeal centers on the document production requirement, item 3 in *Pasillas*'s list. This requirement originates in NRS 107.086(4), which states: ''The beneficiary of the deed of trust shall bring to the mediation the original or a certified copy of the deed of trust, the mortgage note and each assignment of the deed of trust or mortgage note.'' Having these documents available at the mediation allows the mediator and the homeowner to satisfy themselves ''that whoever is foreclosing actually owns the note and has authority to modify the loan,'' *Leyva v. National Default Servicing Corp.*, 127 Nev. 470, 476, 255 P.3d 1275, 1279 (2011) (internal quotations omitted), and, further, that the party seeking the FMP certificate ''is the proper entity, under the nonjudicial foreclosure statutes, to proceed against the property.'' *Edelstein v. Bank of New York Mellon*, 128 Nev. 505, 514, 286 P.3d 249, 255 (2012) (citing NRS 107.086(4)).

Although he did not find bad faith, the mediator's statement reports that BAC ''failed to bring to the mediation each document required,'' citing a gap in the assignments and an early lost note certification seemingly at odds with the trustee's certified claim to currently possess the original. The district court did not agree.

Its findings of fact, conclusions of law, and order find that BAC's ''Certification of Documents [establishes that] the original Deed of Trust, Promissory Note and the missing Assignment of Promissory Note and/or Deed of Trust [are in BAC's] possession'' and conclude that there is ''no irregularity as to the submitted documents.''

BAC's ''certification of documents'' is signed by Sheila Wooten, who works for BAC's trustee. In it, she attests[1] that she has the originals and attaches true copies of the following documents: (1) Einhorn's August 30, 2006, note payable to the order of Countrywide Home Loans, Inc. (Countrywide); (2) a deed of trust of even date, naming Countrywide as ''Lender'' and MERS, ''acting solely as a nominee for Lender and Lender's successors and assigns,'' as ''beneficiary''; (3) Countrywide's September 12, 2006, ''Lost Note Certification'' stating that the original note had been ''misplaced, lost or destroyed''; and (4) an assignment dated September 9, 2010, in which Deutsche Bank National Trust Company as Trustee for the HSI Asset Loan Obligation Trust 2007-AR1 ''grants, assigns and transfer[s] to BAC Home Loans Servicing, LP FKA Countrywide Home Loans Servicing, LP all beneficial interest under [the Einhorn deed of trust] together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said deed of trust/mortgage.''

[Headnotes 5, 6]

A district court's factual findings in the FMP setting receive the same appellate deference as in other settings, *Edelstein*, 128 Nev. at 521-22, 286 P.3d at 260, and '' 'will be upheld if not clearly erroneous and if supported by substantial evidence.' '' *Id.* (quoting *Ogawa v. Ogawa*, 125 Nev. 660, 668, 221 P.3d 699, 704 (2009)). Generous though this standard is, we reject the district court's finding of ''no irregularity'' in BAC's certified document production. As BAC itself concedes, its production omitted a key assignment,[2] to wit: the assignment by which ''Deutsche Bank National

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[1]Einhorn objects to the notary's failure to establish that Wooten was sworn before she signed the certification. This argument fails because Wooten attests to the truth of her statements under penalty of perjury. *See* NRS 53.045 (signed declaration under penalty of perjury as to the existence or truth of a matter is the equivalent of an affidavit); *Buckwalter v. Dist. Ct.*, 126 Nev. 200, 202, 234 P.3d 920, 921-22 (2010). We also note that, as in *Edelstein*, the servicer's appearance on behalf of the beneficiary and the trustee's possession of the note and deed of trust as agent for the beneficiary are developed as issues on appeal. 128 Nev. at 521 n.11, 522, 286 P.3d at 260 n.11, 261-62 (approving the servicer's appearance as a representative for the beneficiary consistent with NRS 107.086(4)).

[2]The Wooten certificate states that ''the attached . . . documents'' are from the file maintained as ''Loan No 144412057'' and ''are true and correct copies of the original promissory note, deed of trust, and each assignment of

Trust Company as Trustee for the HSI Asset Loan Obligation Trust 2007-AR1'' obtained rights to enforce the note (or certificate of lost note) and deed of trust.[3] Without this assignment, Deutsche Bank had nothing to assign to BAC. NRS 111.205(1) (requiring a signed writing to demonstrate a transfer in interest in land); *Leyva*, 127 Nev. at 477, 255 P.3d at 1279.

B.

[Headnote 7]

Although BAC's production lacked a key assignment, Einhorn filled in the gap. His lawyer obtained a copy of the Countrywide/MERS→Deutsche Bank assignment from the county recorder and brought it, first, to the mediation and, later, to the hearing in district court. In it, MERS ''grants, assigns and transfer[s] to Deutsche Bank National Trust Company as Trustee for the HSI Asset Loan Obligation Trust 2007-AR1 all beneficial interest under [the Einhorn deed of trust] together with the note or notes therein described or referred to, the money due and to become due thereon with interest, and all rights accrued or to accrue under said deed of trust/mortgage.'' The assignment is signed by an ''assistant secretary'' of MERS, Angela Nava. Her signature is acknowledged and notarized. The notary recites that ''Angela Nava, [MERS] Ass't Secretary'' is ''know[n] to me (or proved to me . . . through TX DL [driver's license]) to be the person whose name is subscribed to the foregoing instrument and acknowledged to me

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the promissory note and/or deed of trust in my actual possession as an employee of [the trustee].'' Since the assignment by which Deutsche Bank came into the chain of title is not attached, the only fair inference to be drawn is that the trustee did not have that assignment in its possession to certify.

[3]BAC argues that we do not need to consider the assignments because Countrywide and BAC are one and the same entity. The argument goes that, although the note is made payable to the order of Countrywide and has never been endorsed, BAC is Countrywide and is entitled to enforce the note and the deed of trust as the owner in possession of both. In its answering brief, BAC states:

> After the date of the note but prior to [the] date of the mediation, Countrywide's parent company became a wholly owned subsidiary of Bank of America Corporation via merger. BAC Home Loans Servicing, LP was, at the time of the mediation, the loan servicing arm of Bank of America Corporation and was servicing Einhorn's loan at that time.[4] As Bank of America was the successor in interest to Countrywide, there is no need for an endorsement of Countrywide's note to BAC.
>
> [4]BAC has since merged into Bank of America, NA, which is wholly owned by Bank of America Corporation.

BAC offers no record cites for this argument, which it did not make in the district court. A party may not raise ''new issues, factual and legal, that were not presented to the district court . . . that neither [the opposing party] nor the district court had the opportunity to address.'' *Schuck v. Signature Flight Support*, 126 Nev. 434, 437, 245 P.3d 542, 545 (2010).

that . . . she executed the same for the purposes and consideration therein expressed.''[4]

Under *Edelstein*, the Countrywide/MERS→Deutsche Bank assignment establishes BAC's status as ''a person entitled to enforce'' the note, NRS 104.3301, and to foreclose the deed of trust. The deed of trust authorized MERS to transfer the deed of trust and, with it, the right to enforce the note. *Edelstein*, 128 P.3d at 521-22, 286 P.3d at 260-61. The assignment Einhorn supplied demonstrates the transfer from MERS to Deutsche Bank. This in turn establishes Deutsche Bank's authority to transfer the deed of trust and right to enforce the note to BAC, as evidenced by the assignment BAC produced. *Id*. The district court found, based on BAC's certification, that BAC's agent possessed the originals of the note, the certificate of lost note, and the deed of trust.[5] Possession, combined with the transfers evidenced by the two assignments, constitutes prima facie evidence of BAC's entitlement to participate in the mediation as the person entitled to enforce the note and to foreclose on the property. *Id*. at 523-24, 286 P.3d at 261-62.[6]

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[4]Einhorn's concern that Nava signed the assignment on October 23 while the acknowledgment was not taken until October 30 is not supported by citation to authority, *but see* NRAP 28(a)(9)(A) (citation of authorities required), and appears misplaced. The notary acknowledges Nava's identity and the date on which Nava proved herself to be the person whose signature is on the assignment; this may be the same or a later date than the date the instrument was signed. *See* 2010 Unif. Notarial Act § 2 comment, 14 U.L.A. 9 (Supp. 2012) (''It is a common practice for the acknowledging individual to sign the record in the presence of the notarial officer. However, actually signing the record in the presence of the notarial officer is not necessary as long as the individual declares, while in the presence of the officer at that time the acknowledgment is made, that the signature already on the record is, in fact, the signature of the individual.''). Also unremarkable is Nava's dual role as an assistant secretary to both MERS and Deutsche Bank. ''MERS relies on its members to have someone on their own staff become a MERS officer with the authority to sign documents on behalf of MERS. As a result, most of the actions taken in MERS's own name are carried out by staff at the companies that sell and buy the beneficial interest in the loans.'' *Cervantes v. Countrywide Home Loans, Inc.*, 656 F.3d 1034, 1040 (9th Cir. 2011) (citations omitted).

[5]NRS 104.3309 provides for the enforcement of lost, destroyed, or stolen instruments, the rights to which may be assigned. *See In re Caddo Parish-Villas South, Ltd.*, 250 F.3d 300, 302 (5th Cir. 2001). The district court found BAC possessed the original of both the note and the certificate of lost note and rejected Einhorn's suggestion that this signified anything more than the lost note resurfacing at some point. Since the district court's finding of BAC's agent's possession of both originals rests on substantial evidence, we perceive no issue of material fact as to the presence of both in BAC's certified production.

[6]*Edelstein* adopts the position taken in the Restatement (Third) of Property: Mortgages section 5.4(b) (1997) that, ''except as otherwise required by the Uniform Commercial Code, a transfer of a [deed of trust] also transfers the obligation the [deed of trust] secures unless the parties to the transfer agree oth-

Citing *Leyva*, Einhorn argues that BAC should not be able to fill a gap in its document production with an assignment he produced. *Leyva* resembles this case in that the beneficiary failed to bring a key assignment to the mediation. 127 Nev. at 476-77, 255 P.3d at 1279. But in *Leyva*, unlike this case, the key assignment was completely missing; the beneficiary argued that ''because it provided . . . a notarized statement from its employee claiming that it was the rightful owner of the deed of trust, no written assignment was necessary.'' *Id.* We rejected the argument that an affidavit attesting that there had been an assignment could substitute for the written assignment itself:

> [T]o prove that MortgageIT properly assigned its interest in land via the deed of trust to Wells Fargo, Wells Fargo needed to provide a signed writing from MortgageIT demonstrating that transfer of interest. No such assignment was provided at the mediation or to the district court, and the statement from Wells Fargo [attesting to the existence of such an assignment] is insufficient proof of assignment. Absent a proper assignment of [the] deed of trust, Wells Fargo lacks standing to pursue foreclosure proceedings against Leyva.

Id.

NRS 107.086(4) uses the mandatory ''shall'' to express its requirement that ''each assignment of the deed of trust or mortgage note'' be presented at the mediation. Its purpose is ''to ensure that whoever is foreclosing 'actually owns the note' and has authority to modify the loan.'' *Leyva*, 127 Nev. at 476, 255 P.3d at 1279 (quoting Hearing on A.B. 149 Before the Joint Comm. on Commerce and Labor, 75th Leg. (Nev., February 11, 2009) (testimony of Assemblywoman Barbara Buckley)). That purpose is not achieved if key documents, whose production the Legislature has mandated, are missing. For these reasons, *Leyva* holds that ''strict compliance'' with NRS 107.086(4) is required. *Id.* Of note, NRS 107.086(5) says that the district court ''may'' impose sanctions for violations of NRS 107.086(4) and (5), a discretionary determination this court reviews for abuse. *Id.* at 480, 255 P.3d at 1281. Despite this deferential standard, *Leyva* reversed the district court's decision to issue an FMP certificate. We deemed it an abuse of discretion to allow the foreclosure to proceed without the documents needed to determine who could enforce and therefore negotiate with respect to the note and proceed with foreclosure of the deed of trust. *Id.*

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erwise.'' *Edelstein*, 128 Nev. at 518, 286 P.3d at 258. Thus, the conclusion stated in the text follows even though the note is made payable to the order of Countrywide and bears no endorsements, since BAC's agent has possession of the original note.

[Headnote 8]

As noted, this case differs from *Leyva* in that the homeowner brought the missing assignment needed to make the chain of transfers complete. Thus, the note, deed of trust, and ''each assignment of the deed of trust or mortgage note'' were available at the mediation and in the district court. But Einhorn takes a literalist's view. He stresses that NRS 107.086(4) provides that ''[*t*]*he beneficiary* of the deed of trust *shall bring* to the mediation *the original or a certified copy of* the deed of trust, the mortgage note and *each assignment* of the deed of trust or mortgage note.'' (Emphases added.) Since *the beneficiary* (BAC) did not produce all assignments, Einhorn argues that BAC failed to strictly comply with NRS 107.086(4), as required by *Leyva*, and sanctions mandatorily follow. Relatedly, Einhorn objects that the Countrywide/MERS→Deutsche Bank assignment, while acknowledged, is not certified.

[Headnotes 9-11]

We reject Einhorn's arguments. ''[A] court's requirement for strict or substantial compliance may vary depending on the specific circumstances.'' *Leven v. Frey*, 123 Nev. 399, 407, 168 P.3d 712, 717 (2007). In general, '' 'time and manner' requirements are strictly construed, whereas substantial compliance may be sufficient for 'form and content' requirements.'' *Id*. at 408, 168 P.3d at 718; *see id*. at 408 n.31, 168 P.3d at 718 n.31 (noting that one part of a statute can be ''subject to strict compliance, even though other aspects of the statutory scheme were subject to review for substantial compliance''). Furthermore, strict compliance does not mean absurd compliance. *Pellegrini v. State*, 117 Nev. 860, 874, 34 P.3d 519, 528 (2001) (''[W]e must construe statutory language to avoid absurd or unreasonable results . . . .''); 2A Norman J. Singer & J.D. Shambie Singer, *Statutes and Statutory Construction* § 46:2, at 162 (7th ed. 2007) (''Statutes should be read sensibly rather than literally and controlling legislative intent should be presumed to be consonant with reason and good discretion.'').

In NRS 107.086(4), the Legislature directed that certified copies of the note, deed of trust, and all assignments be present at the mediation to ensure that the party seeking to foreclose is the person entitled to enforce the note and to proceed with foreclosure and hence the party authorized to negotiate a modification of either or both. While *Leyva* properly holds that strict compliance with the statute's document mandate is required, who brings which documents, assuming they are all present, authenticated, and accounted for, is a matter of ''form.'' *Leven*, 123 Nev. at 408, 168 P.3d at 718. Only if a specified document is missing does it matter who had the burden of providing it.

Here, Einhorn brought the missing assignment needed to complete BAC's chain of title. Since the assignment includes a certificate of acknowledgment before a notary public, it carries a presumption of authenticity, NRS 52.165, that makes it ''self-authenticating.'' 31 Charles Alan Wright & Victor James Gold, *Federal Practice and Procedure: Federal Rules of Evidence* § 7142, at 259 (2000) (discussing Fed. R. Evid. 902(8), an earlier draft of which Nevada adopted, with slight modifications, as NRS 52.165); *see Fed. Home Loan Mtge. Corp. v. Schwartzwald*, 957 N.E.2d 790, 798 (Ohio Ct. App. 2011) (deeming notarized assignments to be self-authenticating under Ohio's version of Fed. R. Evid. 902(8)), *reversed on other grounds by Fed. Home Loan Mtge. v. Schwartzwald*, 979 N.E.2d 1214 (Ohio 2012). Furthermore, as Einhorn's attorney advised the district court, he obtained his copy of the assignment from the county recorder's office, which ''is sufficient to authenticate the writing.'' NRS 52.085.

All documents needed to determine BAC's entitlement to enforce the note and to foreclose thus were authenticated and present. If Einhorn had not supplied the missing assignment, the minimum sanction of withholding from BAC the FMP certificate needed to foreclose would have followed automatically. *Leyva*, 127 Nev. at 472, 255 P.3d at 1276; *see Holt*, 127 Nev. at 893, 266 P.3d at 607; *Pasillas*, 127 Nev. at 465-66, 255 P.3d at 1286-87. But with all documents present, strict compliance with NRS 107.086(4)'s purposive requirements was achieved. To make the outcome turn on who brought the documents, the authenticity of which was adequately established under conventional rules of evidence, exalts literalism for no practical purpose. Neither *Leyva* nor NRS 107.086(4) can fairly be carried that far. BAC's failure to bring the assignment did not prejudice Einhorn or the mediation. Thus, we conclude that the district court did not abuse its discretion in denying sanctions and allowing the FMP certificate to issue. *See Leyva*, 127 Nev. at 480 n.10, 255 P.3d at 1281 n.10.

II.

We also reject Einhorn's other assignments of error. The district court's findings that BAC provided a proper appraisal and participated in good faith have substantial evidentiary support.

We therefore affirm.

GIBBONS and HARDESTY, JJ., concur.

THE STATE OF NEVADA, APPELLANT, *v.*
SHANNON MICHELLE TRICAS, RESPONDENT.

No. 59559

December 13, 2012 290 P.3d 255

Appeal from a district court order granting respondent's motion to withdraw her guilty plea and to dismiss the criminal case. First Judicial District Court, Carson City; James E. Wilson, Judge.

Defendant who was granted transactional immunity in exchange for her testimony as a material witness in another criminal trial, but not until after she pleaded guilty in her own case yet before her sentencing, filed motion to withdraw her guilty plea and to dismiss the criminal case pursuant to the prosecutorial immunity statutes. The district court granted the motion. State appealed. The supreme court, GIBBONS, J., held that: (1) prosecutorial immunity statutes unambiguously afforded only broad transactional immunity, and (2) the district court's order granting defendant transactional immunity in exchange for her testimony after her entry of guilty plea but before sentencing entitled defendant to withdraw her plea and warranted dismissal of case.

Affirmed.

Neil A. Rombardo, District Attorney, *Gerald J. Gardner*, Assistant District Attorney, and *Daniel M. Adams*, Deputy District Attorney, Carson City, for Appellant.

Diane R. Crow, State Public Defender, and *James P. Logan*, Deputy Public Defender, Carson City, for Respondent.

1. CRIMINAL LAW.
   Courts review questions of statutory interpretation de novo.
2. STATUTES.
   A court's objective in construing a statute is to give effect to the Legislature's intent.
3. STATUTES.
   If a statute is clear on its face, the court will generally not look beyond the statute's plain meaning to determine legislative intent.
4. CRIMINAL LAW.
   Courts generally recognize three types of prosecutorial immunity: (1) use, (2) use and derivative use, and (3) transactional.
5. CRIMINAL LAW.
   ''Use immunity'' provides prosecutorial immunity only for the testimony actually given pursuant to the order compelling said testimony.
6. CRIMINAL LAW.
   ''Use and derivative use immunity'' prohibits both the use of compelled testimony and any information or leads that the State derives from the testimony.

7. CRIMINAL LAW.
   ''Transactional immunity'' in essence provides complete amnesty to the witness for any transactions that are revealed in the course of the compelled testimony.
8. CRIMINAL LAW.
   Prosecutorial immunity statutes unambiguously afforded only broad transactional immunity, as opposed to narrower use immunity. NRS 178.572, 178.574.
9. CRIMINAL LAW.
   The district court's order granting defendant transactional immunity in exchange for her testimony in another criminal trial, after her entry of guilty plea but before sentencing, entitled defendant to withdraw her plea and warranted dismissal of case; prosecutorial immunity statutes conferred transactional immunity, an absolute bar against prosecution, and, since defendant's own drug possession was a central topic of her compelled testimony in the other case, any charges relating to the drugs became ripe for dismissal, including the one to which she had already pleaded guilty and was awaiting sentencing. NRS 178.572, 178.574.

Before the Court EN BANC.

OPINION

By the Court, GIBBONS, J.:

In this appeal, we consider Nevada's prosecutorial immunity statutes, NRS 178.572 and NRS 178.574. NRS 178.572 provides that, on motion of the state, a court ''may order that any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence the witness may be required to produce.'' NRS 178.574 states that ''[s]uch order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.''

The question we must decide is whether a defendant who has been granted immunity under those statutes is protected from further prosecution where that defendant gives immunized testimony after pleading guilty, but before sentencing. Neither NRS 178.572 nor NRS 178.574 provides for use or derivative use immunity. Rather, they confer broad transactional immunity for compelled testimony. We therefore conclude that the statutes immunize defendants from further criminal action when compelled testimony is given pursuant to a grant of immunity under these statutes. We further hold that when this immunity is granted to a defendant who has already pleaded guilty to, but has not yet been sentenced for, offenses implicated by the compelled testimony, the immunity bars the defendant's punishment in the pending criminal prosecu-

tion. Accordingly, we affirm the district court's order granting the motion to withdraw the guilty plea and dismiss the criminal complaint.

FACTS AND PROCEDURAL HISTORY

In July of 2011, a Nevada Highway Patrol officer pulled over an automobile driven by Gary Taylor. Respondent Shannon Tricas was a passenger in the car. Upon removing Tricas from the vehicle, the officer found various narcotics in Tricas's possession, including over 12 grams of methamphetamine concealed in the front of her pants. Tricas told the officer the narcotics belonged to Taylor.

The State filed a criminal complaint against Tricas alleging three felony and three misdemeanor counts. In August, Tricas entered into a plea bargain wherein she agreed to plead guilty to one count of conspiracy to commit a felony under the Uniform Controlled Substances Act, and the court scheduled sentencing for late September. Shortly thereafter, Tricas made a written statement concerning the circumstances of her arrest to the Department of Parole and Probation, for attachment as an addendum to her presentence investigation report. Her statement implicated Taylor as the owner of the drugs, and she described herself as merely holding the drugs for Taylor out of fear of Taylor's retribution. Based on her statement, the State decided to use Tricas as a witness against Taylor at his preliminary hearing. The State filed a motion in justice court requesting that the justice court grant Tricas immunity in exchange for her testimony against Taylor, which was granted.

Prior to sentencing in her own case, Tricas involuntarily testified at Taylor's preliminary hearing. After testifying, Tricas sought to reap the benefit of the immunity granted by the justice court and filed a motion to dismiss the criminal complaint filed against her, a motion to withdraw her guilty plea, and a request for hearing. In her motions, she argued that the justice court granted her transactional immunity, and therefore, the State could no longer prosecute her for any actions discussed in her testimony. The district court granted the motions to withdraw the guilty plea and to dismiss.

The State now appeals. For the reasons set forth below, we affirm and conclude that: (1) Nevada's immunity statutes do confer transactional immunity where a defendant is forced to testify; and (2) the grant of transactional immunity to a defendant in exchange for testimony, even after entering a guilty plea, immunizes a defendant from further prosecution, including sentencing.

DISCUSSION

Nevada's prosecutorial immunity statutes confer transactional immunity

The State argues that the plain meanings of NRS 178.572 and 178.574 require immunity only from future prosecutions, regardless of the type of immunity the statutes might confer. Specifically, the State contends that since Tricas had already pleaded guilty, there could be no Fifth Amendment violation because it was too late for her statements to be used against her. Thus, the State claims that in this situation, the immunity granted only precludes the State from charging new crimes based on the compelled testimony. Tricas argues that the type of immunity intended to be conferred by NRS 178.572 and NRS 178.574 is dispositive, since transactional immunity would grant her full amnesty regardless of the stage of any pending criminal proceedings against her. We agree with Tricas.

The State moved for an order of immunity under NRS 178.572(1), which states, in pertinent part, that a court ''on motion of the State may order . . . any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence the witness may be required to produce.'' NRS 178.574 provides that ''[s]uch order of immunity shall forever be a bar to prosecution against the witness for any offense shown in whole or in part by such testimony or other evidence except for perjury committed in the giving of such testimony.'' These statutes allow the State to compel witness testimony while still affording the witness the protections underlying the Fifth Amendment right against self-incrimination. In choosing to seek immunity for the witness, the State is prioritizing; it is choosing to have answers from the witness instead of the witness's accountability. The justice court's order granting the State's motion incorporated the language from these statutes.

[Headnotes 1-3]

The initial question we must consider is the type of immunity contemplated by the statutes. ''[W]e review questions of statutory interpretation de novo.'' *State v. Lucero*, 127 Nev. 92, 95, 249 P.3d 1226, 1228 (2011). ''Our objective in construing a statute is to give effect to the Legislature's intent.'' *Hobbs v. State*, 127 Nev. 234, 237, 251 P.3d 177, 179 (2011). Generally, this court will not look beyond a statute's plain meaning to determine legislative intent if the statute is clear on its face. *Lucero*, 127 Nev. at 95, 249 P.3d at 1228.

[Headnotes 4-7]

Courts generally recognize three types of immunity: (1) use, (2) use and derivative use, and (3) transactional. *Com. v. Swinehart*, 664 A.2d 957, 960 n.5 (Pa. 1995). ''Use'' immunity ''provides immunity only for the testimony actually given pursuant to the order compelling said testimony.'' *Id*. ''Use and derivative use'' immunity prohibits both the use of compelled testimony and any information or leads that the State derives from the testimony. *Id*. ''Transactional'' immunity ''in essence provides complete amnesty to the witness for any transactions which are revealed in the course of the compelled testimony.'' *Id*.

The United States Supreme Court first recognized the concept of immunity in 1892 in the case of *Counselman v. Hitchcock*, 142 U.S. 547, 585-86 (1892), when it ruled that immunity statutes must provide witnesses with transactional immunity in order to be coextensive with the Fifth Amendment. Specifically, the Court noted that a valid immunity statute ''must afford absolute immunity against future prosecution for the offen[s]e to which the question relates.'' *Id*. at 586. In response to *Counselman*, the United States Congress enacted the Compulsory Testimony Act of 1893, codifying transactional immunity. *See State ex rel. Brown v. MacQueen*, 285 S.E.2d 486, 489 (W. Va. 1981). This federal statute became the model for many state immunity statutes, which ultimately includes our own. *See id*.

Almost a century later, the United States Supreme Court departed from the bright-line rule in *Counselman* that only transactional immunity could afford Fifth Amendment protections, and broadened the scope of immunity to include use and derivative use immunity. *Kastigar v. United States*, 406 U.S. 441, 453 (1972). However, *Kastigar* has not been adopted en masse, as several state courts have refused to recognize anything short of transactional immunity as providing adequate protections against self-incrimination. *See, e.g.*, *State v. Gonzalez*, 825 P.2d 920, 933 (Alaska Ct. App. 1992); *State v. Miyasaki*, 614 P.2d 915, 922-23 (Haw. 1980); *Attorney General v. Colleton*, 444 N.E.2d 915, 918-19 (Mass. 1982); *State v. Soriano*, 684 P.2d 1220, 1232 (Or. Ct. App. 1983) (in banc), *aff'd*, 693 P.2d 26 (1984); *MacQueen*, 285 S.E.2d at 490.

In 1967, the Nevada Legislature enacted NRS 178.572(1) and NRS 178.574. *See* 1967 Nev. Stat., ch. 523, §§ 373.2 and 373.4, at 1457. At that time, the only form of immunity that the United States Supreme Court recognized as adequate to protect the privilege against self-incrimination was transactional immunity, since it was still five years before *Kastigar* deviated from the Compulsory Testimony Act of 1893. *See Kastigar*, 406 U.S. at 453.

Interestingly, the Senate Committee Hearing Minutes from 1967 discussing the immunity statutes reveal that the drafters adopted

Illinois' immunity law as a model for our legislation. *See* Hearing on A.B. 81 Before the Senate Judiciary Comm., 54th Leg. (Nev., April 3, 1967). In fact, the Nevada Legislature copied verbatim the language found in the Illinois immunity statutes, with the exception that Nevada added the preliminary hearing as a forum in which the State can seek immunity. *See* Ill. Rev. Stat. 1975, ch. 38, para. 106-1; Ill. Rev. Stat. 1989, ch. 38, para. 106-2; NRS 178.572(1); NRS 178.574.

In 1977, the Illinois Supreme Court interpreted the statutes from which NRS 178.572 and NRS 178.574 were drawn and determined that its statutes unambiguously afforded only broad transactional immunity, as opposed to narrower use immunity. *See People ex rel. Cruz v. Fitzgerald*, 363 N.E.2d 835, 837 (Ill. 1977) (concluding its transactional immunity statutory language was clear and unambiguous); *see also People v. Giokaris*, 611 N.E.2d 571, 573 (Ill. App. Ct. 1993). The Illinois Supreme Court noted that its statutes do ''not provide in any manner for the transmutation of that transactional immunity into use immunity in prosecutions initiated under the local authority of another State's [a]ttorney.'' *Cruz*, 363 N.E.2d at 837. The court further stated:

> [T]he legislative failure to address this issue may have mischievous results when a grant of transactional immunity in one proceeding serves to wholly immunize a subject from prosecution in a second jurisdiction where the prosecutor may have completed the investigation and be ready to proceed to trial. However, where, as here, the statutory language is clear and unambiguous, there is no occasion for judicial construction. The statute's plain language must be given effect. Any correction of this result must come from the legislature.

Id.

[Headnote 8]

Like Illinois, our statutes do not provide for use immunity. The State makes a reasonable policy argument that use immunity should be available where, as here, a defendant gives immunized testimony after pleading guilty but before sentencing. The problem is that Nevada's immunity statutes do not create this option. We are bound by their plain language and conclude that any correction of this result must come from the Legislature. Therefore, we conclude that the language of NRS 178.572 and NRS 178.574 clearly and unambiguously provides for a grant of transactional immunity. *See* NRS 178.572 (''on motion of the State may order . . . any material witness be released from all liability to be prosecuted or punished on account of any testimony or other evidence the witness may be required to produce''); NRS 178.574 (''[s]uch order of immunity shall forever be a bar to prosecution against the witness for

any offense shown in whole or in part by such testimony or other evidence'').

Based on the foregoing, we conclude that NRS 178.572 and NRS 178.574 confer transactional immunity.[1]

The district court properly granted the motion to dismiss and motion to withdraw guilty plea

[Headnote 9]

The State nonetheless argues that where a defendant has entered into plea negotiations, pleaded guilty, and made a written statement about the circumstances of the arrest, the plain language of the statutes dictate that the conduct to which he or she pleaded guilty is not immunized. We disagree.

NRS 178.572(1) contemplates immunity applying to future prosecutions and to an ongoing criminal prosecution where the defendant has already entered a guilty plea. Further, our reading of this statute's plain language suggests that the Legislature not only intended to preclude future charges, but also intended for immunity to apply through the entirety of a pending criminal prosecution. Specifically, NRS 178.572 states that a ''material witness [may] be released from all liability to be prosecuted *or punished* on account of any testimony . . . the witness may be required to produce'' (emphasis added). Since punishment necessarily occurs at sentencing and only after the entry of a guilty plea or a guilty verdict at a trial, we conclude that the Legislature's choice of adding the words ''or punished'' indicates its intent that immunity be extended to a pending prosecution even if the defendant has already pleaded or been found guilty.

Even without that language in the statute, our conclusion that the Nevada statutes confer transactional immunity would require dismissal of the State's case against a defendant who had pleaded guilty but had not yet been sentenced. Transactional immunity is an absolute bar against prosecution, *see* NRS 178.574 (''[s]uch order of immunity shall forever be a bar to prosecution''); *see also Kastigar*, 406 U.S. at 453 (explaining that transactional immunity ''accords full immunity from prosecution for the offense to which the compelled testimony relates''), and sentencing is an essential part of prosecution, *see* NRS 176.105 (providing that a judgment of conviction must include adjudication and the sentence); *Steinberger v. Dist. Ct. in & for Tenth Jud.*, 596 P.2d 755, 758 (Colo. 1979) (''A recital of the sentence is an essential part of a judgment

[1]Use and derivative use immunity also can be valid protections of a witness's rights, but only where the parties negotiate use and derivative use immunity in contractual, bargained-for situations. NRS 178.572 and NRS 178.574 therefore should not be construed to prohibit the State from offering, or a defendant from accepting, a less protective type of immunity in exchange for testimony as part of a guilty plea agreement.

of conviction.''). Regardless of whether a jury finds a defendant guilty or a defendant pleads guilty, that defendant's compelled testimony prior to sentencing could further incriminate that defendant or increase the severity of the sentence imposed.

Other courts have immunized a defendant from the imposition of a sentence in analogous circumstances. For example, in *State v. McCullough*, the Washington Court of Appeals stated that ''[t]he privilege against self-incrimination does not terminate upon a finding of guilt before the defendant has been sentenced.'' 744 P.2d 641, 643 (Wash. Ct. App. 1987) (citing *Steinberger*, 665 P.2d at 757). The court noted that, ''since the 'function and utility' of the immunity rule exists 'so long as a defendant's testimony might incriminate him or tend to subject him to additional penalties,' . . . the [immunity] rule must be applicable to a defendant . . . whose testimony is compelled before he is sentenced.'' *Id.* at 644 (internal citation omitted). The court reasoned that ''[e]ven after a conviction, the defendant may further incriminate himself by making statements which could affect the severity of the sentence to be imposed.'' *Id.* at 643-44.

Similarly, in *Steinberger v. District Court in & for Tenth Judicial District*, the Colorado Supreme Court held that when a defendant was granted immunity for testimony after being found guilty, but before sentencing, the defendant was immunized from being sentenced. 596 P.2d at 758. That court noted that even after being found guilty, a defendant's forced testimony containing incriminating statements could still influence a court to impose a harsher sentence than if the defendant did not testify. *Id.* at 757. This was true given that Colorado prosecutors have the option to speak before sentence is imposed and can notify the court of any aggravating factors it deems material, inclusive of the right to argue for a higher sentence based on any negative information learned during the course of the compelled testimony. *Id.* (citing Colo. Crim. P. 32(b)(1)). We conclude that the reasoning of these courts is sound, particularly because Nevada prosecutors possess the same right to present aggravating evidence at sentencing as do their Colorado counterparts.[2]

The justice court's order granting Tricas transactional immunity in exchange for her testimony barred the State from prosecuting or punishing Tricas for transactions discussed in the course of her compelled testimony. Since her own drug possession was a central

[2]We note that our analysis would not change where the State's right to argue at sentencing is restricted by virtue of a plea agreement, such as where the State agrees to make no recommendation or to not oppose a particular sentence. Regardless of whether the State chooses to bring to the sentencing court's attention negative inferences drawn from compelled testimony, the slightest chance that the sentencing judge could learn of the incriminating testimony from any source still increases the risk of a harsher punishment based on the defendant's compelled testimony.

topic of her compelled testimony, any charges relating to the drugs became ripe for dismissal, including the one to which she had already pleaded guilty and was awaiting sentencing. Because the district court could not impose a sentence given the immunity order and therefore could not enter a judgment of conviction consistent with the requirements of NRS 176.105, it did not abuse its discretion by allowing Tricas to withdraw her guilty plea and dismissing the charges against her. *See Crawford v. State*, 117 Nev. 718, 721, 30 P.3d 1123, 1125 (2001) (reviewing the district court's decision whether to grant a motion to withdraw a guilty plea for an abuse of discretion); *Hill v. State*, 124 Nev. 546, 550, 188 P.3d 51, 54 (2008) (reviewing the district court's decision to dismiss a count in a charging document for an abuse of discretion). Accordingly, we affirm the district court's order.

CHERRY, C.J., and DOUGLAS, SAITTA, PICKERING, HARDESTY, and PARRAGUIRRE, JJ., concur.

GERALD DEVRIES, APPELLANT, *v.*
MARDELL GALLIO, RESPONDENT.

No. 57199

December 13, 2012 290 P.3d 260

Appeal from a district court divorce decree. Sixth Judicial District Court, Humboldt County; Richard Wagner, Judge.

Action was brought for divorce. The district court divided property and summarily rejected any claim for alimony for either party. Husband appealed. The supreme court, HARDESTY, J., held that: (1) order denying husband any portion of wife's share in business she obtained with separate property was adequately supported by the district court's findings in record; (2) the district court's refusal to allocate to husband any portion of wife's separate interest in cattle ranch under *Van Camp* method of allocation, based on husband's contribution of labor and skill without compensation, was not abuse of discretion; and (3) the district court was required to consider husband's request for alimony by permitting him the opportunity to present evidence in support of request and to consider and make findings on statutory factors on record.

Affirmed in part, reversed in part, and remanded.

Law Offices of Roderic A. Carucci and *Roderic A. Carucci*, Reno, for Appellant.

Bullock Law Offices, Ltd., and *Jack T. Bullock II*, Winnemucca, for Respondent.

1. HUSBAND AND WIFE.
   Order denying allocation to husband of any portion of wife's share in business she obtained with separate property, to which husband devoted labor and skill without compensation, was adequately supported by the district court's findings in record that all of wife's contributions to business derived from her separate property, and that there was no evidence in record that husband's labor contributed to increase in business's value.
2. DIVORCE.
   The supreme court reviews a district court's decisions made in a divorce decree for an abuse of discretion.
3. APPEAL AND ERROR.
   A district court's decisions supported by substantial evidence will be affirmed.
4. EVIDENCE.
   ''Substantial evidence'' is that which a sensible person may accept as adequate to sustain a judgment.
5. HUSBAND AND WIFE.
   In Nevada, when a spouse devotes his or her time, labor, and skill to the production of income from separate property, the court in a divorce proceeding may apportion any increase in value of the separate property business between the separate property and community property estates.
6. HUSBAND AND WIFE.
   The preferred method of apportionment of separate property to which a spouse devoted time, labor, and skill to the production of income is the *Pereira* method, under which the district court may allocate a fair rate of return on the initial investment in the business to the separate property estate, with the remaining value of the business being allocated to the community property estate, unless it is shown that a different method of allocation is more likely to accomplish justice.
7. HUSBAND AND WIFE.
   In order for an increase in value of a spouse's separate property to be community property subject to allocation in a divorce, it must result from community efforts.
8. MOTIONS.
   The district court's failure to include in its order the reasoning or explanation for its ruling does not invalidate the order so long as the reasons for the order are readily apparent elsewhere in the record and are sufficiently clear to permit meaningful appellate review.
9. HUSBAND AND WIFE.
   The district court's refusal to allocate to husband any portion of wife's separate interest in cattle ranch under *Van Camp* method of allocation, based on husband's contribution of labor and skill without compensation, was not abuse of discretion in divorce where husband and wife were both compensated for their contributions in form of room, board, fuel, supplies, and materials, in lieu of actual wages.
10. HUSBAND AND WIFE.
    Under the *Van Camp* method of allocating a separate property in a divorce, the community estate is allocated an amount equal to the average salary of a person performing the same duties as the spouse, with the remaining value of the spouse's separate business being allocated to the separate property estate.
11. DIVORCE.
    The district court was required to consider husband's request for alimony by permitting him the opportunity to present evidence in support of request and to consider and make findings on statutory factors on record. NRS 125.150(8).

12. DIVORCE.
    Two of the principal reasons for awarding alimony, at least in lengthy marriages, are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live as nearly as fairly possible to the station in life enjoyed before the divorce. NRS 125.150.
13. DIVORCE.
    When considering whether to award spousal support, the district court should consider, among other things, the parties' careers before marriage, the parties' educations during marriage, the parties' marketability, the length of the marriage, and what the parties were awarded in the divorce proceedings besides spousal support. NRS 125.150.
14. DIVORCE.
    Where the trial court does not indicate in its judgment or decree that it gave adequate consideration to the appropriate factors in failing to award any alimony, the supreme court shall remand for reconsideration of the issue. NRS 125.150.

Before SAITTA, PICKERING and HARDESTY, JJ.

OPINION

By the Court, HARDESTY, J.:

This appeal concerns the district court's resolution of property division and spousal support issues in a divorce decree. During the divorce proceedings between appellant Gerald DeVries and respondent Mardell Gallio, Gerald sought an interest in Mardell's separate property and requested spousal support. After three evidentiary hearings, which focused on the property division issue, the district court entered a divorce decree in which it found that Gerald was not entitled to any interest in Mardell's separate property. Without conducting an evidentiary hearing on the spousal support request or expressly analyzing the factors for determining spousal support set forth in *Sprenger v. Sprenger*, 110 Nev. 855, 878 P.2d 284 (1994), and NRS 125.150(8), the court declined to award spousal support to either party. Gerald appealed. While we conclude that the district court's separate property decisions are supported by substantial evidence and thus affirm that portion of the decree, we reverse and remand as to the district court's rejection of the spousal support request, because it appears that the court failed to properly consider that issue.

FACTS AND PROCEDURAL HISTORY

The parties were married in 1997 and filed for divorce in 2009. The main issue in the divorce proceedings was the characterization of the couple's property. Both Gerald and Mardell were in the cattle business. After the marriage, Mardell formed two companies,

Gallio Ranches, Inc., and Gallio Cattle, LLC, which held, respectively, her separately owned property, and a 1,500-acre cattle ranch in which she had a 30-percent interest. Gerald argued that he had an interest in Gallio Cattle because he had worked for the company from the time of its formation to the time of the divorce but had never received a wage. He claimed that, due to a premarital civil judgment against him, the parties had agreed that all of his income and earnings would be submitted to Gallio Ranches in order to prevent those assets from being subjected to the premarital judgment.

The district court held three evidentiary hearings focusing on the character of the couple's property. During the hearings, the parties generally discussed the various places that they had worked and their labor contributions to the marriage. They also provided an exhaustive tracing of property and cattle purchased and sold during the marriage. At the conclusion of these hearings, the district court characterized the property as community or separate, held that both Gallio Ranches and Gallio Cattle were Mardell's separate property, and declined to award Gerald an interest in either entity.

Although Gerald sought spousal support from Mardell in his complaint for divorce, the district court did not hear evidence on the support issue. At the conclusion of the evidentiary hearings, Gerald noted that the issue of spousal support had not yet been addressed. Instead of scheduling a fourth evidentiary hearing, however, the district court asked both parties to submit a proposed final divorce decree addressing the spousal support issue. After receiving the proposed divorce decrees, the district court declined to award either party spousal support because it found that there were insufficient facts to support awarding either party spousal support under the ''statutory factors.'' However, the court did not discuss the factors or cite to the law it relied upon in making its finding.[1] Gerald now appeals.

DISCUSSION

Separate property

[Headnotes 1-4]

This court reviews a district court's decisions made in a divorce decree for an abuse of discretion. *Williams v. Williams*, 120 Nev. 559, 566, 97 P.3d 1124, 1129 (2004). Those decisions supported by substantial evidence will be affirmed. *Id.* ''Substantial evidence is that which a sensible person may accept as adequate to sustain a judgment.'' *Id.*

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[1]The parties' proposed divorce decrees were not included in the record on appeal, which hinders our review of the information considered by the district court.

[Headnotes 5, 6]

On appeal, Gerald contends that the district court abused its discretion by failing to award him an interest in Gallio Cattle even though both parties contributed their labor and skill, without compensation, to increase the value of the business.[2] In Nevada, ''when a spouse devotes his time, labor, and skill to the production of income from separate property,'' the court may apportion any increase in value of the separate property business between the separate property and community property estates. *Cord v. Neuhoff*, 94 Nev. 21, 26, 573 P.2d 1170, 1173 (1978). This court has approved the two main methods of apportionment expressed in the California cases of *Pereira v. Pereira*, 103 P. 488 (Cal. 1909), and *Van Camp v. Van Camp*, 199 P. 885 (Cal. Ct. App. 1921). *Id.* The preferred method of apportionment is the *Pereira* method unless it is shown ''that a different method of allocation is more likely to accomplish justice.'' *Id.*

[Headnote 7]

Under the *Pereira* method, the district court may allocate a fair rate of return on the initial investment in the business to the separate property estate, with the remaining value of the business being allocated to the community property estate. *Id.* The increase in the business's value must result from community efforts. *Moberg v. First National Bank*, 96 Nev. 235, 237, 607 P.2d 112, 114 (1980). The record reveals that the increase in value of Gallio Cattle was due primarily to the value of the real property owned by the company. *See Cord*, 94 Nev. at 26, 573 P.2d at 1173 (stating that there must be an apportionment between the separate and community estates ''unless the increment is due solely to a natural enhancement of the property''). The company purchased a 1,500-acre ranch in 2002 for $380,000 and sold the ranch in 2010 for $1.2 million. Mardell owned a 30-percent share of the company. After extensive tracing, the district court concluded that all of Mardell's contributions to Gallio Cattle derived from her separate property. Furthermore, there is no evidence in the record that affirmatively demonstrates that the labor of either Mardell or Gerald contributed to the increase in value of Gallio Cattle.

[Headnote 8]

Although the district court did not explain in its order which method it applied to reject an allocation of a community property interest in Gallio Cattle, its failure to include this information does not invalidate the order ''so long as the reasons for the [order] are readily apparent elsewhere in the record and are suffi-

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[2]Gerald does not challenge the district court's characterization of Gallio Ranches and Gallio Cattle as Mardell's separate property.

ciently clear to permit meaningful appellate review.'' *Las Vegas Novelty v. Fernandez*, 106 Nev. 113, 118, 787 P.2d 772, 775 (1990). The record contains substantial evidence that supports the conclusion that the district court did not abuse its discretion in declining to apply the *Pereira* method to allocate an interest in Gallio Cattle to the community estate.

[Headnotes 9, 10]

Further, the district court did not abuse its discretion in refusing to allocate a portion of the separate property under the *Van Camp* method, even though Gerald testified that he worked for Gallio Cattle for approximately eight years without receiving a wage. Under the *Van Camp* method, the community estate is allocated an amount equal to the average salary of a person performing the same duties as the spouse, with the remaining value of the business being allocated to the separate property estate. *Cord*, 94 Nev. at 26, 573 P.3d at 1173. Here, Mardell testified that both she and Gerald were compensated for their labor in the form of room and board, food, fuel, supplies, and materials in lieu of actual wages. Thus, we conclude that the district court did not abuse its discretion in declining to apply the *Van Camp* method to award Gerald an interest in Gallio Cattle because there is substantial evidence in the record to support a finding that Gerald was amply compensated for his labor. Therefore, we affirm the property determinations of the divorce decree.[3]

Spousal support

[Headnote 11]

Gerald argues that the district court abused its discretion by failing to award him spousal support.[4] The district court has wide discretion in determining whether to grant spousal support, and this

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[3]We also reject Gerald's argument that the district court abused its discretion by failing to award Gerald an interest in Gallio Ranches. Although Gerald presented evidence that Gallio Ranches increased in value during the marriage, there was minimal evidence of what labor, if any, Gerald contributed to Gallio Ranches. The increase in value of Gallio Ranches appears to have come solely from the sale and acquisition of cattle and equipment, and the extensive tracing performed by the district court showed that these cattle and equipment were purchased with Mardell's separate property or the rents therefrom. Thus, we affirm this portion of the divorce decree.

[4]Mardell contends that Gerald is unable to argue this issue on appeal because he presented insufficient evidence below to the district court. However, despite Gerald's request for spousal support in the complaint for divorce, the district court did not hold an evidentiary hearing on the issue of spousal support. Instead, the district court requested that the parties submit proposed final divorce decrees addressing this issue. Thus, because Gerald never had an opportunity to present evidence below, we conclude that Mardell's argument is without merit.

court will not disturb the district court's award of alimony absent an abuse of discretion. *Wolff v. Wolff*, 112 Nev. 1355, 1359, 929 P.2d 916, 918-19 (1996). The court ''[m]ay award such alimony to the wife or to the husband, in a specified principal sum or as specified periodic payments, as appears just and equitable.'' NRS 125.150(1)(a).

[Headnotes 12-14]

Two of the principal reasons for awarding alimony, at least in lengthy marriages, ''are to narrow any large gaps between the post-divorce earning capacities of the parties, and to allow the recipient spouse to live 'as nearly as fairly possible to the station in life [ ] enjoyed before the divorce.' '' *Shydler v. Shydler*, 114 Nev. 192, 198, 954 P.2d 37, 40 (1998) (alteration in original) (citations omitted) (quoting *Sprenger v. Sprenger*, 110 Nev. 855, 860, 878 P.2d 284, 287 (1994)). When considering whether to award spousal support, the district court should consider, among other things, the parties' careers before marriage, the parties' educations during marriage, the parties' marketability, the length of the marriage, and what the parties were awarded in the divorce proceedings besides spousal support. *Sprenger*, 110 Nev. at 859, 878 P.2d at 287, *cited with approval in Schwartz v. Schwartz*, 126 Nev. 87, 91, 225 P.3d 1273, 1275 (2010); *see also* NRS 125.150(8). Importantly, ''[w]here the trial court does not indicate in its judgment or decree that it gave adequate consideration to the [appropriate] factors in failing to award any alimony . . . , this [c]ourt shall remand for reconsideration of the issue.'' *Forrest v. Forrest*, 99 Nev. 602, 606, 668 P.2d 275, 278 (1983).

Here, the district court summarily rejected an award of spousal support when it found that there were insufficient facts to support awarding either party spousal support under the ''statutory factors.'' The record reveals that all three evidentiary hearings focused on the division of property between the parties, and the district court did not hear evidence on the support issue. Further, although the district court's order mentioned its consideration of ''the statutory factors'' in rejecting an award of spousal support, presumably referring to the factors listed in NRS 125.150(8), which are similar to the *Sprenger* factors and to the factors articulated in the case cited by Gerald, *see Buchanan v. Buchanan*, 90 Nev. 209, 215, 523 P.2d 1, 5 (1974), it is unclear from the record if or how the district court applied those factors to the limited evidence that was before it. It is therefore difficult to determine on what basis the district court arrived at its conclusion that neither party was entitled to spousal support.

Based on our review of the record and the divorce decree, we conclude that the district court abused its discretion by failing to

properly consider whether Gerald was entitled to spousal support. Gerald was not afforded an opportunity to present any evidence relating to spousal support because the evidentiary hearings focused solely on the division of property between the parties, and the district court's order failed to explain its reasons for awarding no spousal support. Thus, we reverse that portion of the divorce decree relating to spousal support, and we remand this matter to the district court for it to properly consider the statutory and *Sprenger* factors with regard to spousal support.

Accordingly, we affirm in part and reverse in part the district court's divorce decree and remand this matter for further proceedings consistent with this opinion.

SAITTA and PICKERING, JJ., concur.

INGER CASEY, APPELLANT, *v.*
WELLS FARGO BANK, N.A., RESPONDENT.

No. 57656

December 13, 2012 290 P.3d 265

Appeal from a district court order confirming an arbitration award and entering judgment. Tenth Judicial District Court, Churchill County; David A. Huff, Judge.

Bank filed motion to confirm arbitration award in its favor. The district court summarily confirmed award, and account holder appealed. The supreme court, PICKERING, J., held that: (1) account holder had 10 days from date bank filed motion to confirm arbitration award to respond to motion; and (2) account holder had 90 days after receipt of arbitrator's notice of award to file motion to vacate, modify, or correct award.

Reversed and remanded.

Smith & Harmer, Ltd., and *Julian C. Smith Jr.* and *Joylyn Harmer*, Carson City, for Appellant.

Lewis & Roca LLP and *Paul A. Matteoni* and *Scott S. Hoffmann*, Reno, for Respondent.

1. ALTERNATIVE DISPUTE RESOLUTION.
   The district court must decide the merits of the motion to vacate, correct, or modify an arbitration award in the first instance. NRS 38.241(2), 38.242(1).
2. APPEAL AND ERROR.
   The supreme court reviews de novo a district court's legal conclusions, including matters of statutory interpretation.

3. APPEAL AND ERROR; COURTS.
   Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes, and therefore, the district court's legal conclusions regarding court rules are reviewed de novo.
4. ALTERNATIVE DISPUTE RESOLUTION.
   Account holder had ten days from date bank filed motion to confirm arbitration award to respond to motion. NRS 38.218.
5. ALTERNATIVE DISPUTE RESOLUTION.
   Bank account holder had 90 days after receipt of arbitrator's notice of award to file motion to vacate, modify, or correct award, and thus, the district court's summary grant of bank's motion to confirm award, without permitting account holder to file motion to modify or correct award before expiration of order, and without reviewing arbitration record before confirming award, was reversible error. NRS 38.241(2), 38.242(1).
6. ALTERNATIVE DISPUTE RESOLUTION.
   Despite the limited judicial review available in arbitration cases, the district court nonetheless has the authority and obligation to review the award before rubber-stamping it. NRS 38.239.

Before SAITTA, PICKERING and HARDESTY, JJ.

OPINION

By the Court, PICKERING, J.:

Nevada has adopted the Uniform Arbitration Act of 2000, codified in NRS 38.206 to 38.248 (UAA). *See* NRS 38.206; 2001 Nev. Stat., ch. 280, §§ 1-44, at 1274-87. The UAA provides for judicial review and enforcement of arbitration awards. It provides that the winning party can move the district court for an order confirming the award, NRS 38.239, and gives the losing party 90 days from the date of notice of an adverse arbitration award to move the district court to vacate, modify, or correct the award. NRS 38.241(2); NRS 38.242(1).

In this case, the district court summarily granted the motion of respondent Wells Fargo Bank, N.A., to confirm its arbitration award against appellant Inger Casey. It did so without giving Casey the opportunity to be heard in opposition to the motion to confirm, even though the 90-day period for Casey to move to vacate, modify, or correct the award had yet to run. Because this was error, we reverse and remand.

I.

This dispute began when Casey deposited four checks made payable to ''Inger Casey, Pat & Linda Dempsey'' into her Wells Fargo checking account. The Dempseys did not endorse the checks. After the issuer questioned the missing endorsements, Wells Fargo opened a fraud investigation and froze the funds. Litigation followed, including a counterclaim by Casey against Wells

Fargo alleging breach of contract and violation of the Electronic Fund Transfer Act, 15 U.S.C. §§ 1693 to 1693r, inclusive. Eventually, the matter was submitted to arbitration through the American Arbitration Association.

[Headnote 1]

After a three-day hearing, the arbitrator issued a written award in Wells Fargo's favor. Casey filed a motion with the arbitrator to modify the award, which he denied. Wells Fargo then moved the district court for an order confirming the arbitration award and for entry of judgment on it. Within hours, the district court granted Wells Fargo's motion. Casey objected by filing a motion to strike the district court's confirmation order and judgment, arguing that she should have been afforded the opportunity to oppose the motion to confirm and/or to file a competing motion to vacate, modify, or correct the award. The district court denied Casey's motion to strike, concluding that NRS 38.239 mandates confirmation unless a motion to vacate, modify, or correct the award is already on file before the motion to confirm is filed. Casey appeals.[1]

II.

[Headnotes 2, 3]

This court reviews de novo a district court's legal conclusions, including matters of statutory interpretation. *Douglas Disposal, Inc. v. Wee Haul, LLC*, 123 Nev. 552, 557, 170 P.3d 508, 512 (2007). ''Court rules, when not inconsistent with the Constitution or certain laws of the state, have the effect of statutes.'' *Margold v. District Court*, 109 Nev. 804, 806, 858 P.2d 33, 35 (1993). And so, we also review de novo legal conclusions regarding court rules. *See id.*

A.

[Headnote 4]

First, Casey is correct that the district court should not have granted Wells Fargo's motion to confirm without giving her time to oppose it. NRS 38.218(1) provides that, ''[e]xcept as otherwise

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[1]After the confirmation order was filed, Casey filed a motion in the district court to vacate, modify, or correct the arbitration award. Casey filed her notice of appeal before the district court acted on this motion, so it remains undecided. Wells Fargo argues that Casey's motion deprives this court of jurisdiction, but this is incorrect under NRS 38.247(1)(c), which provides a direct right of appeal from an order confirming an arbitration award. We decline Casey's invitation to reach the merits of the motion to vacate, correct, or modify. Although we reverse the summary confirmation order, it is for the district court on remand to decide the merits of the motion to vacate, correct, or modify in the first instance. *See Johnson v. Wells Fargo Home Mortg., Inc.*, 635 F.3d 401, 409 (9th Cir. 2011).

provided in NRS 38.247, an application for judicial relief under NRS 38.206 to 38.248, inclusive, must be made by motion to the court and heard in the manner provided by rule of court for making and hearing motions.'' Since Wells Fargo based its motion to confirm on NRS 38.239, the motion qualified as an ''application for judicial relief under NRS 38.206 to 38.248,'' meaning NRS 38.218 and the local ''rule[s] of court'' apply. Under Third Judicial District Court Rule 7(B), ''[a]n opposing party [Casey] . . . shall have ten (10) days after service of the moving party's [Wells Fargo's] memorandum within which to serve and file a memorandum of points and authorities in opposition to the motion.''[2] Here, Wells Fargo served its motion to confirm on Casey on December 21, 2010, and the district court granted it the next day, December 22, 2010. The motion to confirm should not have been decided without giving Casey the ten days provided by the court rules to file a written opposition to it.

B.

[Headnote 5]

Second, Casey argues, again correctly, that the district court erred when it held that NRS 38.239 required it to summarily confirm the arbitration award, making an opposition pointless.

NRS 38.239 reads as follows:

> After a party to an arbitral proceeding receives notice of an award, the party may make a motion to the court for an order confirming the award *at which time the court shall* issue a confirming order unless the award is modified or corrected pursuant to NRS 38.237 or 38.242 or is vacated pursuant to NRS 38.241.

(Emphasis added.) In denying Casey's motion to strike, the district court relied on NRS 38.239, particularly the words emphasized above. In its view, the use of ''shall'' in NRS 38.239 mandated summary confirmation of the award because, when Wells Fargo filed its motion to confirm, no motion to vacate, modify, or correct the award had been filed.

A party who loses in arbitration has 90 days after the arbitrator gives notice of the adverse award to file a motion to vacate under NRS 38.241(2) or to modify or correct under NRS 38.242(1).[3]

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[2]Effective January 1, 2012, Churchill County was removed from the Third Judicial District to become the newly created Tenth Judicial District. 2011 Nev. Stat., ch. 316 § 1, at 1772-73. We apply the Third Judicial District Court Rules here because the district court proceedings took place in Churchill County before the change.

[3]If a party moves to vacate the award because it ''was procured by corruption, fraud or other undue means,'' the 90-day time period begins when the

Here, Casey received notice of the arbitrator's award at the earliest on November 4, 2010. When the court entered its order confirming the award on December 22, 2010, Casey thus was still within the 90-day statutory period allowed for filing a motion to vacate, modify, or correct. An opposition thus cannot be said to have been pointless. *See Thompson v. Lee*, 589 A.2d 406, 409 (D.C. 1991) (an opposition to a motion to confirm serves the same purposes as a motion to vacate, and so, a nonmoving party is entitled to file an opposition, so long as the 90-day time period has not elapsed); 4 Thomas H. Oehmke, *Commercial Arbitration* § 133:5 (3d ed. & Supp. 2012) (''If a losing party fails to move to vacate, modify or correct an award, and the three month deadline for doing so has not yet arrived, then objections to confirmation may still be raised.'').

NRS 38.239 codifies section 22 of the UAA. *See* Unif. Arbitration Act (2000) § 22, 7 U.L.A. 76 (2009). Because the language in section 22 of the UAA is almost identical to that of NRS 38.239, comment 1 to section 22 is useful in interpreting our statute. Comment 1 makes the point that:

> Although a losing party to an arbitration has 90 days after the arbitrator gives notice of the award to file a motion to vacate under Section 23(b) [NRS 38.241(2)] or to file a motion to modify or correct under Section 24(a) [NRS 38.242(1)], a court need not wait 90 days before taking jurisdiction if the winning party files a motion to confirm under Section 22 [NRS 38.239]. Otherwise the losing party would have this period of 90 days in which possibly to dissipate or otherwise dispose of assets necessary to satisfy an arbitration award. If the winning party files a motion to confirm prior to 90 days after the arbitrator gives notice of the award, the losing party can either (1) file a motion to vacate or modify at that time or (2) file a motion to vacate or modify within the 90-day statutory period.

The error in this case thus was not in the district court accepting jurisdiction over the motion to confirm. It was in summarily adjudicating the motion to confirm, without giving Casey the opportunity to file an opposition to the motion or to file a motion to vacate, modify, or correct, while she was still within the 90-day period to so move.

[Headnote 6]

''[I]f a party fails to make a timely motion to vacate an award, the right to oppose confirmation on a statutory basis (that could

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''ground is known or by the exercise of reasonable care would have been known by the movant.'' NRS 38.241(2).

have been raised in a timely vacatur petition but was not) is waived.'' Oehmke, *supra*, §§ 133:5-6.[4] But when the 90-day period has not run, the district court ''must review the arbitration documents to determine the propriety of issuing an order of confirmation.'' Susan Wiens and Roger Haydock, *Confirming Arbitration Awards: Taking the Mystery Out of a Summary Proceeding*, 33 Wm. Mitchell L. Rev. 1293, 1306 (2007). In this case, much as in *Graber v. Comstock Bank*, the district court erred in not reviewing the arbitration record and award before confirming it. 111 Nev. 1421, 1428-29, 905 P.2d 1112, 1116 (1995). Despite the limited judicial review available in arbitration cases, the district court nonetheless ''had the authority and obligation'' to review the award before rubber-stamping it. *Id*.

Accordingly, we reverse and remand with instructions to allow Casey an opportunity to be heard in opposition to the motion to confirm and on her motion to vacate, modify, or correct and for the district court to review the arbitration award consistent with this opinion.

SAITTA and HARDESTY, JJ., concur.

TODD BUTWINICK, AN INDIVIDUAL; AND NEVADA FURNITURE INCORPORATED, A NEVADA CORPORATION, APPELLANTS, *v*. CHARLES HEPNER, AN INDIVIDUAL; TRACY HEPNER, AN INDIVIDUAL; AND NEVADA FURNITURE IDEA, INC., A NEVADA CORPORATION, RESPONDENTS.

No. 56303

December 27, 2012 291 P.3d 119

Motion to substitute in as real parties in interest and to dismiss proper person appeal from a district court judgment in a contract and tort action.

Judgment creditors moved to substitute themselves as the real parties in interest in judgment debtor's appeal of underlying action

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[4]The rule of waiver applies when the statutorily allotted time to move to vacate, modify, or correct an award has run. *Compare Lander Co., Inc. v. MMP Investments, Inc.*, 107 F.3d 476, 478 (7th Cir. 1997) (''Under the [Federal Arbitration] Act, if you fail to [timely] move to vacate an arbitration award you forfeit the right to oppose confirmation (enforcement) of the award if sought later by the other party.''), *with* Oehmke, *supra* § 133:5 (''Some courts have suggested that a *non-statutory* basis for vacatur (e.g., manifest disregard of the law, violation of public policy, due process, laches, violation of fundamental due process, and the like) may be articulated even after the three-month limitations period (to modify, correct or vacate) has expired.'').